No. 851

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

MARIE S. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court rendered no opinion. The judge's charge to the jury will be found at page 88 of the record. The opinion of the Circuit Court of Appeals (R. 111) is reported in 15 F. (2d) 809.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered October 25, 1926. (R. 117.) Petition for certiorari was filed January 25, 1927, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936). The petition was granted March 7, 1927.

QUESTIONS PRESENTED

This case involves the following questions:

(1) Does the Revenue Act of 1921 disclose an intention on the part of Congress to impose an income tax on gains derived from illicit traffic in liquor in violation of the National Prohibition Act?

(2) Assuming, as courts below have uniformly held, that Congress did intend to tax income derived from unlawful activities, is the provision of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself violated by the requirement that a taxpayer, whose income is partly or wholly derived from an unlawful source, must make an income-tax return?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The pertinent language of the Fifth Amendment is—

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 223 (a) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 250) provides as follows:

> That the following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—
>
> (1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,000 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

Section 212(a) provides (p. 237):

That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

Section 213 provides (p. 237):

That for the purposes of this title * * * the term "gross income"—

(*a*) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income

derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(*b*) Does not include the following items, which shall be exempt from taxation under this title [exempting 12 items, none of which include the income from such a source as here involved and none of which are pertinent to the question here presented].

Section 214 provides (p. 239):

(*a*) That in computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *;

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business * * *;

* * * * *

(7) Debts ascertained to be worthless and charged off within the taxable year (or, in

the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part:

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913; * * *.

Section 1300 provides (p. 308):

* * * every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

Section 1307 provides (p. 310):

That whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax.

Section 228 (p. 252) provides:

That if the collector or deputy collector has reason to believe that the amount of any income returned is understated, he shall give

due notice to the taxpayer making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated, may increase the same accordingly. Such taxpayer may furnish sworn testimony to prove any relevant facts and if dissatisfied with the decision of the collector may appeal to the Commissioner for his decision, under such rules of procedure as may be prescribed by the Commissioner with the approval of the Secretary.

Section 1308 provides (p. 310):

That the Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Section 1309 (p. 310) provides:

That no taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books

of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Section 1310(a) (p. 310) provides:

That if any person is summoned under this Act to appear, to testify, or to produce books, papers or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Section 257 provides (p. 270):

That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President * * *.

Section 1311 amends Section 3167 of the Revised Statutes to read as follows (p. 311):

It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses,

expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

Section 253 provides (p. 268):

That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title,

or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

Section 1311 amends Section 3173 of the Revised Statutes to read as follows (p. 312):

It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, (1) in case of a special tax, on or before the thirty-first day of July in each year, and (2) in other cases before the day on which the taxes accrue, to make a list or return, verified by oath, to the collector or a deputy collector of the district where located, of the articles or objects, including the quantity of goods, wares, and merchandise, made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, article or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose

the particulars of any and all the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further,* That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do

so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm, or corporation, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned: * * *.

Section 1311 amends Section 3176 of the Revised Statutes to read as follows (p. 313):

If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by

regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

If the failure to file a return or list is due to sickness or absence, the collector may allow such further time, not exceeding thirty days, for making and filing the return or list as he deems proper.

The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner of Internal Revenue shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the fail-

> ure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax 50 per centum of its amount.
>
> The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax.

Section 1303 provides (p. 309):

> That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.
>
> * * * * *

Pursuant to this authority, Treasury Regulations No. 62 were promulgated. Articles 401 and 402 thereof require that the return of an individual with a gross income of more than $5,000, within which class it is claimed respondent in this case falls, shall be on Form 1040. Article 407 of Regulations 62 further provides:

> Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return.

> Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified, and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form.

At the top of page 1 of Form 1040 (copy in appendix hereto) is a blank space headed "Occupation, Profession, or Kind of Business," and on the back of the form Instruction 16(c) reads: "Describe the business or profession in the space provided on page 1, as 'grocery,' 'retail clothing,' 'drug store,' 'laundry,' 'doctor,' 'lawyer,' 'farmer,' etc., and fill in Schedule B, page 2 of the return." Schedule B relates to inventories, bad debts, expenses, etc., some of which items must be particularly described. For example, Instruction 13 on the back of the return provides that "Any amount claimed as a deduction for necessary expenses

* * * should be fully explained in Schedule G, page 2 of the return, or in an attached statement." Instruction 16(c) provides that "If you are engaged in a trade or business in which the production, purchase, or sale of merchandise of any kind is an income-producing factor, secure from the Collector of Internal Revenue and file as a part of this return a *Certificate of Inventory, Form 1126.*" (Copy in appendix.) Such certificate calls for no details other than the total values entirely without regard to the kind and quality of merchandise carried in the business. The inventory itself does not accompany this certificate.

Treasury Decision 2962, promulgated January 7, 1920 (Vol. 22 T. D. Int. Rev., p. 7), reads in part as follows:

> No specific provision is made in the statutes for furnishing a copy of an income return to anyone. Authority to permit inspection does not carry with it authority to furnish a copy. Implied authority to furnish a copy is contained in several provisions of law constituting returns public records, and in sections 161 and 251, Revised Statutes, which confer upon the Secretary of the Treasury broad power to make rules and regulations concerning "custody, use, and preservation of the records, papers, and property" of the department and the enforcement of the internal-revenue laws. Because of the provisions contained in section 3167, Revised Statutes, as amended * * * a copy of an income return can not be fur-

nished, except as provided by law, to anyone except the person or persons who made the return. * * * There are numerous provisions in the statutes constituting the doing or failure to do certain things offenses against the United States, and providing for collecting unpaid taxes by suits in court and for bringing suits to recover taxes and penalties wrongfully collected. These provisions would be of no avail were it held that the returns themselves, or certified copies thereof provided for in section 882, Revised Statutes, could not be used by the Government as evidence in such litigation or in preparation for same. Manifestly Congress did not, when it enacted section 3167, Revised Statutes, intend to defeat prosecutions and suits in court for which it has specifically provided.

Income returns filed with the department are public records of the department, and public records in the Treasury Department are of right available as evidence in litigation in court unless there is some statute making it unlawful to use them as such. (*Winn* v. *Patterson*, 9 Pet., 663, 677; *Evanston* v. *Gunn*, 99 U. S., 660; 17 Cyc., 306; *Williams* v. *Conger*, 125 U. S., 397, 410; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S., 286, 298; *Oakes* v. *U. S.*, 174 U. S., 778; *Texas, etc., Ry. Co.* v. *Swearingen*, 196 U. S., 51, 60.) As, therefore, the use of income returns or copies thereof in connection with litigation in court, where the United States Government is interested in the result, is provided for by law, such returns or copies

may be furnished for such use without a violation of the provisions of section 3167 Revised Statutes, as amended.

STATEMENT

Two indictments were returned against respondent in the Eastern District of South Carolina. One indictment charged perjury in connection with an income-tax return for the year 1919, in violation of Section 125 of the Penal Code. (R. 4.) The other indictment, filed March 6, 1923, was in three counts, and charged evasion of income taxes, in violation of Section 253 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1085) and 1921, *supra*. The first count charged respondent with filing a false and fraudulent income-tax return for the year 1919, while the second and third counts (the latter being the only count with which we are here concerned) charged willful refusal to file returns for the years 1920 and 1921, respectively, alleging that in each of said years he had received profits of $10,000 from his automobile agency and his business of selling beverages. (R. 1–3.) The two indictments were consolidated, and the case was tried at the January, 1926, term of the District Court, at Charleston, South Carolina. (R. 4.) Prior thereto respondent had been tried and acquitted of conspiracy to violate the National Prohibition Act and had pleaded guilty and paid a fine for the transportation and possession of liquor in violation of the National Prohibition Act. (R. 56–57.) In the instant case

respondent appeared without counsel, entered a plea of not guilty as to both indictments and conducted his own case. (R. 4.)

When interviewed in 1922 by revenue agents with respect to his income-tax liability respondent refused to give any information as to the source of his income, on the ground that to do so would incriminate him (R. 11, 12, 18, 27), but no claim of privilege respecting his failure to file a return was made or suggested until he reached the Circuit Court of Appeals in this case. At the trial he voluntarily took the stand in his own behalf and testified freely that during the years covered by the indictments he was engaged in the unlawful sale of liquor and defended on the ground that instead of conducting said business at a profit it had been conducted at a loss. (R. 55–80.) A part of his gross income was derived from lawful transactions (R. 3, 12, 16, 24, 28, 62), but the amount does not appear, so it was not shown that he had sufficient ($5,000) gross income from lawful sources to require a return as to that. The jury returned a verdict of not guilty on the perjury indictment, a verdict of not guilty on the first and second counts of the income tax evasion indictment, and a verdict of guilty on the third count of the latter indictment which charged willful refusal to file a return for 1921. (R. 106.) A motion for a new trial was made and refused; whereupon, on January 25, 1926, a sentence of six months in jail was duly imposed. (R. 107.)

On the same date respondent sued out a writ of error from the Circuit Court of Appeals for the Fourth Circuit. (R. 109.) Four errors were assigned. Assignments 1, 2, and 3 were as to the admissibility of certain evidence, and the fourth assignment was on the refusal of the judge to direct a verdict of acquittal "on the ground that on the whole evidence the Government had failed to make out its case against defendant." (R. 108–109.) In his brief and upon argument before the Circuit Court of Appeals respondent waived the first three assignments of error, and thereupon set up for the first time the contention that there should have been a directed verdict because (1) unlawful gains were not income within the meaning of the Revenue Act of 1921 and (2) that, in any event, he was relieved from the duty of making a return by the provision of the Fifth Amendment to the Constitution that no person "shall be compelled in any criminal case to be a witness against himself."

The Circuit Court of Appeals (R. 117) reversed the judgment of conviction of the District Court on the theory that, although Congress has the power and by the Revenue Act of 1921 manifested an intention to tax the gains of criminal transactions, said Act (1) does not furnish to one who makes incriminating disclosures in his income tax return an immunity from prosecution equivalent to the protection afforded by the Fifth Amend-

ment, because, under *Counselman* v. *Hitchcock*, 142 U. S. 547, and *Brown* v. *Walker*, 161 U. S. 591, the protection of secrecy conferred by Section 3167 of the Revised Statutes, as amended by Section 1311 of the Revenue Act of 1921, falls short of that secured by the Fifth Amendment; and (2) that the privilege against self-incrimination furnishes a complete defense to an indictment charging any natural person under Section 253 of the Revenue Act of 1921 with failure to file a return of income as required by Section 223 (a) of said Act when the return, if filed, would disclose that income was earned in the course of the commission of a crime, because, under *Boyd* v. *United States*, 116 U. S. 616, and *Arndstein* v. *McCarthy*, 254 U. S. 71, the written statements under oath in the return of the taxpayer in answer to questions propounded therein must be held to be the testimony of a witness, and amount to self-incrimination if they disclose the commission of a crime. (R. 111–117.)

On the other hand, the Government contends, first, that the return of income as required by Section 223 of the Revenue Act of 1921 compels no disclosures incriminating in character; second, that the defendant did not, in the proper manner or in timely season, claim the constitutional privilege which he asserts his lawbreaking activities give him from filing the return; and, third, that the protection against self-incrimination does not apply to tax returns, since they are in the nature of public records required by law to be made.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in reversing the judgment of the District Court and holding that Section 223 (a) of the Revenue Act of 1921, *supra*, so far as it requires the filing of a tax return by one whose income is derived from the illegal sale of beverages is in conflict with the self-incrimination clause of the Fifth Amendment to the Constitution.

SUMMARY OF ARGUMENT

The gains and profits derived from illicit traffic in liquor constitute income. It has been uniformly held by the courts that such income was intended by Congress to fall within the purview of the Income Tax Act of 1921. This interpretation is shown by the all-inclusive language used by Congress to define income and by the history of the changes in income-tax legislation. The questions asked in the required income tax return, Form 1040, do not compel the disclosure of any fact which tends to incriminate. Only information of the most general character relating to the nature of the taxpayer's business is demanded, none of which in itself constitutes proof of unlawful dealings. In determining the nice balance that exists between the constitutional rights of the individual and the sovereign's right to compel information necessary for governmental purposes the courts will go as far "as may be consistent with the lib-

erty of the individual." This is illustrated in *Mason* v. *United States,* 244 U. S. 362, and *Ex parte Irvine,* 74 Fed. 954.

The taxpayer will not be permitted to set himself up as the judge of his rights under the Fifth Amendment. He must comply with the Government's demand on him for information at least to the point where the information would tend to incriminate. *Podolin* v. *Lesher Warner Dry Goods Company,* 210 Fed. 97.

In this case respondent failed to raise any claim of immunity he might have had under the Fifth Amendment in the proper manner or form, and in the failure to do so his privilege must be deemed to be waived. *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* No. 111, October Term, 1926, decided January 3, 1927.

A tax return is the statement of account between the taxpayer and his Government. It is impressed with a public interest and constitutes a public document. The cases of *Boyd* v. *United States,* 116 U. S. 616, and *Wilson* v. *United States,* 221 U. S. 361, both recognize that records required by law to be kept constitute an exception to the application of the Fifth Amendment. Numerous State cases have recognized this principle. *United States* v. *Sischo,* 262 U. S. 165, is authority for the Government's contention herein, because the effect of the Fifth Amendment on the interpretation contended for by the Government of the statute requiring manifests underlay the whole case.

The effect of the interpretation of the Circuit Court of Appeals of the Income Tax Act in this case would be to favor the lawbreaker and excuse from the operation of the Income Tax Act any person who set up a claim that his income had been derived even in part from criminal operations. Such interpretation is to be avoided because it is contrary to the purposes of the Act and is not demanded by a proper application of the Fifth Amendment.

ARGUMENT

I

THE GAINS DERIVED FROM ILLICIT TRAFFIC IN LIQUOR ARE TAXABLE INCOME WITHIN THE INTENT OF THE REVENUE ACT OF 1921

The court below decided this point in favor of the Government and rested its reversal upon constitutional grounds, but as this Court ordinarily will not approach or decide a constitutional question if a consideration of that question may be avoided by passing upon preliminary questions of statutory interpretation (*United States* v. *Katz*, 271 U. S. 354) it is deemed advisable in this brief to deal with the interpretation of the statute.

Intrinsically the gains and profits of this respondent constitute income. The record discloses the fact that he realized some profit (amount undetermined, R. 3, 12, 16, 24, 28, 62) from the lawful business of selling trucks and automobiles. The rest of his profits were realized not only from the purchase and sale of intoxicating liquors (R. 56–

57), but also from the compensation for illegal transportation of liquor for others (R. 80–82). The Government maintained that he should have made an income tax return of all of this for the taxable period. It is impossible from the record to divide his profits which are admittedly income from the lawful automobile business from profits arising from unlawful operations. But the latter as clearly constitute income as the former, and differ in no respect from gains and profits realized from dealings in other commodities or by dealings in intoxicating liquor for lawful purposes. The fruits of such transactions were in either case his as against all the world. The liquor in which he dealt might have become, if seized and condemnation proceedings had, forfeit to the Government. But after the respondent's dealings were completed, the profits he made therefrom were his property. In this respect they are totally unlike stolen or embezzled money, which has been held not to be income for want of title in the thief or embezzler. *Rau* v. *United States*, 260 Fed. 131 (C. C. A. 2d).

That Congress has the power to tax income from unlawful sources there can be no doubt. As stated by this Court in *United States* v. *Stafoff*, 260 U. S. 477, 480, "Of course Congress may tax what it also forbids." See also *Murphy* v. *United States*, No. 443, October Term, 1926, decided December 6, 1926; *United States* v. *Yuginovich*, 256 U. S. 450; and the *License Tax Cases*, 5 Wall. 462.

The fact that the taxes considered in those cases were excises, while we are here dealing with an income tax, can make no difference in principle. This Court has repeatedly held that the only effect of the Sixteenth Amendment on the taxing power was to remove the requirement for apportionment. *Eisner* v. *Macomber*, 252 U. S. 189; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103. If Congress has power to levy excises upon things which are outlawed, it would seem necessarily to follow that it likewise has power to levy an income tax on the gains derived from the dealings in such outlawed things. The only question for determination, therefore, is whether Congress in the Revenue Act of 1921 intended to and did exercise its power to tax income "from whatever source derived" irrespective of the legality of that source.

The language Congress has chosen to describe income discloses an all-inclusive intent. The language that Congress has used to enumerate those who must file income-tax returns discloses an intent to reach everybody. Sections 210 and 211 of the Revenue Act of 1921, *supra*, levied normal and surtaxes upon the net income of *every individual*. Section 212(a) defines the term "net income" to mean the gross income as defined in Section 213, less the deductions allowed by Section 214, and Sec-

tion 213(a) provides that the term "gross income"—

> Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Section 213(b) specifies the only items of income which Congress has exempted from taxation under that title. Income from unlawful sources is not included among the exemptions either specifically or by inference.

What clearer terms could Congress have used than the above statutory definition to indicate an intent to exercise its power to tax incomes to the fullest extent conferred by the Sixteenth Amendment? Wealth in the form of income amassed from year to year by individuals and corporations comes from activities lawful and unlawful, vocations and businesses of many kinds. A business in which illegal methods are resorted to may be productive of greater income than one conducted wholly within the law. Entirely outlawed enterprises of wide scope and potentialities for

sudden wealth are too well known to assume that Congress was unaware of them when using all-inclusive language to define the incomes reached by the taxing statutes. Congress could not have used such language, and at the same time intended to exclude wealth unlawfully acquired from the operation of the statute, except through ignorance of such sources of wealth. It is much more reasonable, we submit, to assume that Congress intentionally chose the all-embracing language in Section 213(a), having in mind the definition of "business" as laid down by this Court in *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 171, where it said:

> "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. 1, p. 273.

Can it be successfully maintained that the gains of one who systematically engages, as did respondent, in the purchase and sale of prohibited articles, or who receives compensation for services rendered to others in violating the law, was not intended by Congress to be income derived from business merely because that business happens to be unlawful? Is it not rather the income of one who "occupies" his "time, attention and labor * * * for the purpose of a livelihood or profit"? Is it not plainly income from a "vocation"?

The word " vocation " is used in the income tax laws of Great Britian as well as those of the United States; and as early as 1886 the courts of Great Britian gave to that word the meaning for which the Government here contends. In *Partridge* v. *Mallandaine,* decided by the High Court of Justice (Queen's Bench Division), 2 Great Britain Tax Cases, 179, it appears that the "appellants stated that they had no profession or employment but that they attended race courses as bookmakers or betters on horseracing * * * and that the profits made by them from attending race courses and betting as aforesaid were not legal profits or gains, and were not assessable to the income tax." In holding that such gains were intended to be taxed, Denman, J., stated (p. 180):

> The way in which the contention is stated in the case is this: "The surveyor contended that betting systematically and annually carried on came within the provisions of the Income Tax Act as a vocation." Now, the case states enough for us. It finds here that it is stated that these two persons are persons who in partnership attend races, and systematically and annually carry on that business or that pursuit so as to make profits. We must assume then for this purpose that the question is whether the Income Tax Commissioners are right in holding that it was a vocation within the meaning of Schedule D. Now, I think they were quite right. The words are "profession, em-

ployment, or vocation." I do not feel myself disposed to put so limited a construction upon the word "employment" as Mr. Graham desires us to put upon it. I do not think "employment" necessarily means a case in which a person is set to work by other means to earn money. A man may employ himself in order to earn money in such a way as to come within that definition, but I think the word "vocation" is a still stronger word. It is admitted to be analogous to the word "calling," which is a very large word; it means the way in which a person passes his life, and it is a very large word indeed. These persons go to races and they systematically bet, and for this reason, it must be assumed, make profits. Does it lie in their mouths to say that they are not to be assessed to income tax because they can not bring an action in respect of the bets which they make? Every year they have so many of their bets paid as puts, say, 1,000*l.* a year in their pockets; and to say that because they can not bring an action to recover the bets they make, betting being made illegal by Act of Parliament, therefore they do not carry on a vocation, it seems to me is putting a construction upon the Act which would be giving a very undue favour to persons with whom the Legislature is by no means disposed to deal with favour, inasmuch as the thing they do is a thing which is hampered by the Legislature because it is supposed to be mischievous, namely, the

> recovery of bets by actions so as to facilitate the making of bets and the carrying on of vocations such as this. *But I go the whole length of saying that, in my opinion, if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of 2,000l. a year, the Income Tax Commissioners would be quite right in assessing him* if it were in fact his vocation. There is no limit as to its being a lawful vocation, nor do I think that the fact that it is unlawful can be set up in favour of these persons as against the rights of the revenue to have payment in respect of the profits that are made. *I think this does come within the definition of the word "vocation" according to common sense and according to the ordinary use of language,* and therefore I think the Income Tax Commissioners were right. (Italics ours.)

Substantially the same question came before the Board of Tax Appeals in the case of *Appeal of James P. McKenna,* 1 B. T. A. 326 (1925), and *Appeal of Mitchell M. Frey, Jr.,* 1 B. T. A. 338 (1925). In the *McKenna case,* following the reasoning of the English court in the *Partridge case, supra,* the Board says, p. 329):

> It is contended by the taxpayer that winnings on gaming contracts do not constitute gains, profits, and income within the meaning of the revenue act just quoted, because such contracts are illegal and have no recog-

> nition at law, and that the language of the act has application to gains, profits, and income from legal transactions and sources only. We do not think this contention well founded. In the first place the words "from any source whatever" are as broad and comprehensive as it is possible for language to be. There is no limitation that the gains, profits, and income must be legally received. To read the above quoted section of the statute as if it were "from any *legal* source whatever" would be to read into the statute something which Congress did not see fit to incorporate therein. To do so would be to legislate rather than to interpret, and this we have no authority to do. In our opinion Congress meant precisely what it said when it included gains, profits, and income from any source whatever, irrespective of the nature of that source.

The precise question in the case at bar, that is, the taxability of the income from traffic in illicit liquor under the Revenue Acts of the United States was before the Circuit Court of Appeals for the Second Circuit in *Steinberg* v. *United States*, 14 F. (2d) 564. The court said (pp. 566, 567):

> That a given sinner or criminal must, in the pursuit of his or her prohibited vocation, break many laws to obtain the wherewithal to satisfy the taxing law, must be regarded as immaterial, for the whole matter is covered by one remark of Holmes, J., in *United States* v. *Stafoff*, 260 U. S. 477,

> * * * "*Of course* Congress may tax what it also forbids." This is compendious enough, and was said about liquor; and equally is it of course that, if the Legislature can tax the liquor which it forbids, it can also tax the gains made by dealing in that which is forbidden.
>
> * * * * *
>
> * * * The question is not whether this is wise or politic, fair or in good taste, but whether it can legally be done. We think it can under the language of the statutes, and know that similar things have been done for generations.
>
> * * * * *
>
> Thus we hold that the unknown increment above the sum reported for 1921 as Steinberg's income was taxable, and he was punishable for concealing the facts under Section 253 of the statute.

The question whether the gains from illicit traffic in liquor fell fairly within the general intent of the Canadian Income Tax Act was decided by the Privy Council of Great Britain in the case of *Cecil R. Smith*, opinion delivered July 27, 1926, not yet reported, but set forth in the appendix hereto. This case involved an appeal from the decision of the Supreme Court of Canada, which reversed a decision in the Exchequer Court holding that profits arising within Ontario from the illicit traffic in liquor contrary to the provisions of provincial legislation were taxable income as defined by the Income

War Tax Act of 1917, as amended. In its opinion by Viscount Haldane sustaining the tax on income from such illicit traffic, the Judicial Committee of the Privy Council stated as follows:

> Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

The decision of the Circuit Court of Appeals for the Second Circuit in the *Steinberg case* and the decisions of the Board of Tax Appeals in the *McKenna* and *Frey cases* find direct confirmation in the history of the Revenue Acts. In the first Revenue Act passed after the adoption of the Sixteenth Amendment, that of 1913 (c. 16, 38 Sat. 114, 167), Congress evinced an intention to exclude from the operations of the Act income derived from unlawful activities. In that Act, Congress restricted income from business solely to that derived from "the transaction of any *lawful* business carried on for gain or profit," etc. It is significant, however, that the word "lawful" was dropped from the definition of income in the very next Revenue Act passed, in 1916 (c. 463, 39 Stat. 756, 757), and it has never reappeared in any of the revenue laws subsequently enacted. To have thus restricted the application of the Income Tax Act in the first law and then to have dropped the restricting word can admit of but one conclusion, to wit, that Congress, by the change of language, changed its intent. To hold now that income does not include unlawful gains would be to read back into the law the word "lawful." As said by this Court in *Carey* v. *Donohue*, 240 U. S. 430, 437, "we are not at liberty to supply by construction what Congress has clearly shown its intention to omit."

Accordingly, the Treasury Department has consistently from 1916 down to the present time interpreted the several Revenue Acts as applying to in-

come from all sources, whether lawful or unlawful. The courts give great weight to such a uniform departmental construction, particularly when Congress in subsequent legislation in reenacting the same provisions fails to indicate in any way its disapproval of the settled construction of the Department. *Swigart* v. *Baker*, 229 U. S. 187; *United States* v. *G. Falk & Brother*, 204 U. S. 143; *Komada* v. *United States*, 215 U. S. 392; *United States* v. *Hermanos y Compania*, 209 U. S. 337, and numerous other cases to the same effect.

All of the courts before whom this question has come have sustained the contention of the Government that Congress intended to tax income from unlawful sources. But in arriving at that conclusion they have indulged in considerable discussion of objections that may be raised to such a conclusion. These objections all relate to the difficulty or impropriety of applying certain administrative provisions of the Revenue Acts to illegal businesses rather than to what Congress actually intended. They are set forth at length in the dissenting opinion in the *Steinberg case*, *supra*. These objections, considered and summarized by the court below, may be reduced to three in number.

First, it is objected that (R. 112, opinion of court below)—

> The taxpayer is not only to make a return, stating the items of his income under section 223 as pointed out above, but is required by

> section 1300 (42 Stat. 308) to keep such records and render under oath such statements and returns, and to comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary, may from time to time prescribe. The criminal would be compelled to keep a business record of his crime.

This objection proceeds upon the theory that this offends the Fifth Amendment. That is one of the questions before this Court in the case at bar. We believe it is fully answered in the succeeding arguments in this brief in which it is contended, first, that the information required to be stated in income tax returns is not such as is incriminating in character, and, second, that tax returns, being public records required to be made by law, are not within the protection of the Fifth Amendment. If the Government is correct in either of these positions, then the above objection is not valid.

Second, it is objected that (R. 112, opinion of the court below)—

> Section 214 of the act (42 Stat. 239) provides for the deductions allowable in computing the net income of the taxpayer, and specifies that they shall include all the ordinary and necessary expenses paid or incurred in carrying on the business; and thus the law would seem to impose upon the Government, in order to ascertain the net income of an illicit trade, the duty to examine, if not to allow such expenses as the bribery of officials and others equally obnoxious.

Of course Income Tax Acts do not allow deductions for all expenses. They recognize only necessary and ordinary expenses, and bribery of officials is neither of these. Furthermore, the objection relates entirely to a matter of policy which is for Congress and not for the courts. That Congress intended to adopt the policy of applying all the provisions of the Tax Act to unlawful businesses we believe to be sufficiently shown by the dropping of the word "lawful" from the Revenue Acts, which has been discussed above. The objection proceeds upon the theory that taxation must be a form of license. The answer to that, and the advisability of adoption by Congress of the policy of taxing the fruits of unlawful business can not be better stated than by Judge Cooley in *Youngblood* v. *Sexton*, 32 Mich. 406, whose comments are quoted herewith as pertinent reasoning (pp. 421, 426):

> The idea that the state lends its countenance to any particular traffic by taxing it, seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens; they are necessary, it is true, to the existence of government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities, that under some circumstances

they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the Government when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine any citizen would prefer to be visited with the untaxed frowns of government rather than with those testimonials of approval which are represented by the demands of the tax-gatherer. * * *

If one puts the Government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual. Certainly, whatever discriminations are made in taxation ought to be in the direction of making the heaviest burdens fall upon those things which are obnoxious to the public interests, wherever that is practicable.

Third, it is objected that (R. 112, opinion of court below):

Section 1311 (42 Stat. 311) reenacts amongst others, section 3167 of the Revised

> Statutes which makes it unlawful (with certain exceptions discussed below) for any collector or officer or employee of the United States to divulge or make known to any person, the amount or source of income set forth or disclosed in any income return, or to permit any return or copy thereof to be seen or examined by any person, and any offense against this provision is a misdemeanor, punishable by fine or imprisonment; and it is suggested that Congress could not have intended to impose upon the agents and employees of the United States, under any circumstances, the obligation to keep secret information of the commission of crime which should come to them in their official capacity.

This objection is fully answered by Treasury Decision No. 2962, *supra*, to the effect that Section 3167 was not designed to and does not prevent the use of tax returns in prosecutions and suits in court where the United States is interested.

There is less contradiction between an intent on the part of Congress to prohibit the illicit traffic in liquor and at the same time to tax the income from such traffic than there would be to prohibit the traffic and exempt from taxation gains therefrom. Despite hypothetical inconsistencies which may be argued from the prohibition of traffic in beverage liquor and the interpretation of the Income Tax Act contended for, and the difficulties of administrative application to lawbreakers which may be

foreseen, we maintain that it was the intent of Congress to catch within the net of the Revenue Act of 1921 income derived from every source. If a contrary interpretation be established, then, as stated by this Court in *Irwin* v. *Gavit*, 268 U. S. 161, 166, the Revenue Act—

> has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent.

II

THE INFORMATION REQUIRED TO BE STATED IN AN INCOME TAX RETURN IS NOT SUCH THAT IT MIGHT INCRIMINATE

By virtue of the substantial character of the privilege of the Fifth Amendment that "no person * * * shall be compelled in any criminal case to be a witness against himself" it was early settled that not only is the protection against the compulsory direct admission, but also against the compulsory disclosure of any fact which furnishes a "necessary and essential part of a crime." Chief Justice Marshall in *In re Willie* (Burr's trial), 25 Fed. Cas. No. 14692e, 38, 40. But it is only such a fact which may be withheld. Unless the fact is clearly a "necessary and essential part of a crime" its disclosure in an appropriate proceeding may be compelled. Moreover the court must have reasonable ground to fear danger to the party from the use of his answer in subsequent proceedings, since the protection "does not extend to remote possibili-

ties out of the ordinary course of law." *Heike* v. *United States*, 227 U. S. 131, 144.

In *Ex parte Irvine*, 74 Fed. 954, following the rule laid down by Chief Justice Marshall in the *Willie case*, *supra*, the court said (p. 960):

> The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that

> there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

A similar announcement of the rule is found in *Brown* v. *Walker*, 161 U. S. 591, 599.

Respondent was prosecuted for failure to fill out the tax return on Form 1040 (copy in appendix). Whether the Commissioner could have under the law demanded a return of detailed information of such a kind and character as to "furnish proof of a link in the chain of evidence necessary to convict him of a crime" and thus violate the rule against self incrimination, it is clear that this return did not do so. The information demanded in every blank in Forms 1040 and 1126 could have been furnished without giving a single, necessary or probable "link" in proving him guilty of law violation.

The details of his business were required under Schedule B, and No. 16 of the paragraphs of Instructions shows that information of the most general character is sufficient to comply with the demands of Schedule B. For example, although in respondent's own testimony in the court below it was disclosed that he was in the bootlegging business, had he complied with the statute and filled out Form 1040, he need not have revealed that fact. It would have been sufficient to meet the requirements of the return to have listed his business as "retail beverages" or "wholesale beverages." Such a description would have been as consistent with innocence as with guilt. Even if he had gone fur-

ther and supplied information not absolutely required, by describing his business as "liquor business" and that his gross income, expenses and losses therefrom each amounted to so much, such disclosures would not constitute "necessary and essential parts of a crime." Under the National Prohibition Act, not every sale of intoxicating liquor is criminal; possession of such liquor under some circumstances is not prohibited; nor is there any prohibition against the manufacture of intoxicating liquor under certain conditions.[1] It is only *unlawful* sale, possession, and manufacture which is condemned and made criminal.[2] Suppose respondent stated in his return that he was dealing in liquor. This in itself is no proof of unlawful dealings.

The lower court's position in this case rests upon a false premise, to wit, that in an examina-

[1] Act of October 28, 1919, c. 85, 41 Stat. 305, Title II, Sec. 3, sale, possession, manufacture, etc., permitted for nonbeverage and sacramental purposes; Sec. 4, possession of liquor to be used in manufacture of exempted articles; Sec. 33, possession in private dwelling for personal use; Sec. 37, manufacture of alcoholic liquors for use by denaturation in nonalcoholic beverages; Title III, Secs. 2 and 7, industrial alcohol plants and distilleries; Sec. 8, sale or other disposition of industrial alcohol.

[2] National Prohibition Act, *supra*, Title II, Sec. 3, manufacture, sale, possession, etc., forbidden except as authorized in Act; Sec. 6, manufacture, sale, etc., without permit; Sec. 10, manufacture, sale, etc., without making permanent record; Sec. 11, limitations upon sale by manufacturers and wholesale druggists; Sec. 25, possession of liquor or property intended for use in violating law; Title III, Sec. 20, manufacture, sale, possession, etc., in Canal Zone.

tion of Form 1040, under the Income Tax Act, there would from the four corners of the return itself be revealed incriminating facts. Such facts could only be regarded as incriminatory if they were supplemented by knowledge on the part of the court that the operations back of the income reported were in themselves unlawful. If by extrinsic evidence the respondent's commission of a crime is *prima facie* established and charged in an indictment or an information, then it is possible that in the trial of that case his income tax return might become "useful" in proving the extent of his criminal operations. But, as pointed out in the *Irvine case*, the mere statement of a man's name or his place of residence might later become useful to indentify him as a felon. It is not that information elicited by the income tax return might, in a hypothetical case, have evidentiary value, but the true test is, rather, whether the facts demanded in the return, viewed by themselves alone, furnish or show some tangible and substantial probability of furnishing an essential link in proving the taxpayer guilty of a crime.

Furthermore, the decision as to whether information demanded from a witness constitutes a violation of the Fifth Amendment is for the judge to determine in the light of the particular case before him at the time the privilege is claimed. Lower courts have applied the rule against self-incrimination with care and with "a due regard

for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual." The right of the sovereign to demand information in a tax return is one that may not be lightly restricted. We submit that only when clearly inconsistent with the liberty of the individual may any of the steps in collecting a tax be hampered. Such view is the manifestly fair one to both sovereign and citizen. Cases arise—and this may be one—where the courts should go to the very limit beyond which would be to impinge upon the guarantees of the Fifth Amendment. The contending rights of the lawbreaker and the sovereign's power to compel necessary information struck a delicate balance in the case of *Mason* v. *United States,* 244 U. S. 362. There this Court, interpreting the privilege of immunity claimed by the witness in the light of the circumstances disclosed in the record, upheld the lower court in denying the immunity claimed. A grand jury at Nome, Alaska, was investigating a charge of gambling in violation of Section 2032, Compiled Laws of Alaska, 1913, which makes it an offense to play cards for something of value. Mason, a witness before the grand jury, on the ground of self-incrimination, refused to answer the following questions: (1) "Was there a game of cards being played on this particular evening at the table at which you were sitting?" (2) "Was there a game of cards being played at another table at

this time?" Another witness, Hanson, also refused to answer, on the same ground, substantially similar questions. In holding that the witnesses were not relieved from answering such questions, this Court said (p. 367):

> No suggestion is made that it is criminal in Alaska to sit at a table where cards are being played or to join in such game unless played for something of value. * * *
>
> The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded and, in the circumstances disclosed, we can not say he reached an erroneous conclusion.

It is submitted that each case where immunity is claimed under the Fifth Amendment must rest upon its own particular facts. Weighing them herein, it is plain that the information demanded of Sullivan by performing his public duty to make an income tax return on Form 1040 was less incriminating than answering the questions propounded in the *Mason case* above. It was less incriminating because here on the face of the return not the slightest connection with unlawful enterprises was compelled. And the detail of the disclosures referred only to the amounts of gains and profits which, in the eyes of the law, were themselves untainted with illegality. Disclosing such gains and profits is too remote from the commission of a crime itself to fall within the protection of the Fifth Amendment. Giving the Government facts

about the amount of gains in any taxable year is far different from asking a witness whether or not he has purchased liquor to drink, as was the nature of the questions in *Ex parte Frenkel*, 17 Ala. App. 563, and in the *Matter of M. T. January*, 295 Mo. 653, in which cases the State courts upheld the right of witnesses to refuse to answer. The reply to the question whether a witness had purchased liquor for beverage purposes would, if answered in the affirmative, clearly involve the witness in the commission of a crime.

The difficulty in this case is that Sullivan substituted his own judgment for that of the court in deciding whether the information requested would reasonably have a tendency to incriminate him. The proper procedure would have been for him to have secured Form 1040 and therein either to have signified his privilege with respect to any particular question, the true answer to which he believed would tend to incriminate him, or leave blank the space provided for that answer.

To uphold respondent's contention in the court below that merely because he now alleges his business was unlawful, he was in 1921 excused from filing any return would be to sanction the noncompliance with the Income Tax Act on the part of any taxpayer who, when discovered, gives as a reason the fact that his profits, wholly or in part, have arisen from unlawful activities. An interpretation of the law the effect of which would be to place in the hands of the lawbreaker the opportunity to

exercise judicial interpretation of his constitutional rights, and to leave the judicial test of the soundness of his claim to the accident of later discovery that he relied on the Fifth Amendment to cloak his noncompliance with the statutes, is to be avoided if a contrary interpretation can be fairly found. In the case of *Podolin* v. *Lesher Warner Dry Goods Company* (C. C. A. 3rd), 210 Fed. 97 (affirming *In re Podolin*, 205 Fed. 563), and *In re Podolin*, 202 Fed. 1014, it was held that involuntary bankrupts, even though at the time under indictment for misuse of the mails (mailing false financial statements), were bound to *file schedules* of assets and liabilities *up to the point where they claimed the information would tend to incriminate*, and leave to the court the judgment as to whether answers to the questions they failed to supply were subject to immunity.

The same ruling should apply to tax returns. The taxpayer could be permitted to leave unanswered any question the answer to which he believed incriminating. When thereafter called upon by the revenue officials to supply the missing information by the appropriate mode of procedure (subpœna under Sections 1308 and 1310 (a) of the Revenue Act of 1921 and Section 3173 R. S. as amended by Section 1311 of the same Act), the taxpayer could respond and then claim his privilege after being sworn. In this way full room would be left for the operation of the Fifth Amendment and a taxpayer would be deprived of none of his

rights. A tax return so prepared might be meager and unsatisfactory, but the taxpayer would at least have complied with the requirements of the Revenue Acts up to the point where he could secure a ruling on his constitutional privilege, and the sovereign would not be denied its right of having returns filed from all taxpayers within a certain class.

III

THE QUESTION OF IMMUNITY UNDER THE FIFTH AMENDMENT HAS NOT BEEN PROPERLY RAISED

Although respondent when asked orally for information about his affairs subsequent to the date when his return should have been filed, refused to give any information on the ground that it might incriminate him, the question of self-incrimination was not raised in any way or form at the time his return should have been filed, nor was it raised in the District Court. It was not mentioned until the case reached the Circuit Court of Appeals. In the District Court respondent took the stand in his own behalf and voluntarily testified to the nature of his violations of the National Prohibition Act in an effort to establish the fact that he had made no profits in his lawbreaking and therefore had no income to return. Under these circumstances the question of self-incrimination is not properly in the case at bar. On this point it suffices to quote the following statement of this Court in *United States ex rel. Vajtauer* v. *The Commissioner of*

Immigration (No. 111, October Term, 1926, decided January 3, 1927):

> It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, *Mason* v. *United States*, 244 U. S. 362, a determination which it cannot make if not advised of the contention. Cf. *In re Edward Hess & Co.*, 136 Fed. 988; *Ex parte Irvine*, 74 Fed. 954, 960. The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. See *In re Knickerbocker Steamboat Co.*, 139 Fed. 713; *United States* v. *Skinner*, 218 Fed. 870, 876; *United States* v. *Elton*, 222 Fed. 428, 435.

IV

STATUTORY IMMUNITY FROM PROSECUTION FOR INCRIMINATING DISCLOSURES IN TAX RETURNS IS NOT NECESSARY TO THE RIGHT TO REQUIRE THE FILING OF SUCH RETURNS, SINCE THEY ARE PUBLIC RECORDS REQUIRED BY LAW TO BE MADE

It is conceded that Section 3167 of the Revised Statutes as amended by Section 1311 of the Revenue Act of 1921, does not extend to one making incriminating disclosures in tax returns immunity coextensive with the protection afforded by the Fifth Amendment. But from this it does not follow, as the court below assumed, that the law requiring such return is in conflict with the Fifth Amendment.

A tax return is nothing other than an official record upon which a taxpayer is required by law to state the account for taxes between himself and his Government. It is thus clearly impressed with a public interest or quality. The rule that protection against self-incrimination does not apply to public records is well established. It is equally well established that the same rule applies to records required by law to be kept by private citizens for some governmental purpose. Wigmore on Evidence, 2d Ed., Vol. 4, Sec. 2259 (c).

Such an exception to the application of the Fifth Amendment is recognized in the leading case of *Boyd* v. *United States*, 116 U. S. 616. There this Court, after pointing out the analogy between the Fourth and Fifth Amendments and the object of both to protect the citizen from compulsory testimony against himself, stated that there were necessarily excepted therefrom certain articles, writings, or things, and particular mention was made of the manufacture or custody of excisable articles "and the entries thereof in books required by law to be kept for * * * inspection" (p. 623).

Again in *Wilson* v. *United States*, 221 U. S. 361, where the right was sustained to compel a corporate official to produce corporate books over his personal objection that they would incriminate him the same as if they were his own, this Court discussed the rule respecting public records and stated that the principles applied not only to public documents in public offices—

> * * * but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, can not be maintained. (Page 380.)

In support of the above statement this Court cited with approval such cases as *State* v. *Donovan*, 10 N. D. 203, and *State* v. *Davis*, 108 Mo. 666 (reversed on another point in 117 Mo. 614). In the former there was a statute requiring the defendant, who was a druggist, to keep a record of his sales of intoxicating liquors, and in the latter there was a requirement that a druggist should preserve prescriptions compounded by him. These, manifestly, were not corporate records or documents in public offices, yet the public interest in the citizen's private business had resulted in the enactment of statutes requiring the keeping of records which thereby became impressed with such a public character as to require their production and use over the objection of self-incrimination. See also *State* v. *Davis*, 68 W. Va. 142; *People* v. *Coombs*, 158 N. Y. 532; *L. & N. R. R. Co.* v. *Commonwealth*, 21 Ky. L. 239; *State* v. *Smith*, 74 Ia. 580; *State* v. *Cummins*, 76 Ia. 133; *People* v. *Henwood*, 123 Mich. 317; *Langdon* v. *People*, 133 Ill. 382. See *contra*, *State* v. *Pence*, 173 Ind. 99. In the *Pence case*, however, the ground of the court's decision was that there was no provision of the statute making a druggist's

records public records. In the instant case tax returns are made public records by Section 257 of the Revenue Act of 1921, *supra*.

Federal cases to the same effect are *United States* v. *Sherry*, 294 Fed. 684, and *United States* v. *Mulligan*, 268 Fed. 893. The *Sherry case* involved the provision of the Harrison Anti-Narcotic Act requiring a dealer to preserve prescriptions for a period of two years. The court propounded the question as to whether or not the documents were of a character which subjected them to the scrutiny demanded and asked "Did the custodian voluntarily assume a duty which overrides his claim of privilege?" Whereupon the court, applying the principles of the *Wilson case*, *supra*, declared the question must be answered in the affirmative.

The *Mulligan case*, *supra*, arose under the Lever Act and involved the production of books and papers which the defendant was compelled to keep under the statute as a condition of doing business. There, over objection, the court invoked the rule of the *Wilson case*, *supra*, and held that such records were not within the protection of the Fifth Amendment. While this Court subsequently, in *United States* v. *Cohen Grocery Company*, 255 U. S. 81, held a portion of the Lever Act invalid, it was not upon any point discussed in the *Mulligan case*, and such holding does not militate against the reasoning of the court in that case upon the doctrine declared in the *Wilson case*.

It may be objected that the cases so far cited relate to public records already in existence, while in the case at bar we are concerned with records not yet made and which it is sought to require the taxpayer to bring into existence. The rule, however, goes that far.

In *People* v. *Rosenheimer*, 209 N. Y. 115, the defendant was indicted for violation of a section of the State highway law which punished failure to stop and report name, residence, operator's license, etc., to the injured party after an accident had occurred. Immunity against self-incrimination was pleaded. After stating (p. 119) that the statute undoubtedly required the defendant "to make known a fact which will be a link in the chain of evidence to convict him of crime, if in fact he has been guilty of one," the court upheld the right to compel the required report and went on to say (p. 120):

> Physicians are required to report deaths and their causes, druggists the sale of poisons, and failure to comply with these requirements is made a misdemeanor. (Penal Law, sec. 1743; Pub. Health Law, Sec. 235.) The Labor Law (Section 87) requires a person in charge of any factory to report to the commissioner of labor all deaths, accidents or injuries and the details thereof. Compliance with any of these statutory regulations may, in the case of the commission of a crime by the person who is required to make the certificate or registry, prove an

important factor in leading to his detection, but this is not sufficient to render the legislation invalid. Whether, as claimed by the respondent's counsel, the statute before us goes so much further in the way of self-incrimination as to render the illustrations referred to inapplicable, it is not necessary to definitely determine.

In *State* v. *Hanson*, 16 N. D. 347 (reversed on another point in 215 U. S. 515), the court upheld over a claim of immunity against self-incrimination the commitment of defendant in default of bail to answer to the charge of neglecting to register and publish a receipt issued to him by the United States for payment of the internal revenue tax upon the occupation of a retail liquor dealer despite the fact that such occupation was prohibited by the State. See also *Ex parte Knoedler*, 243 Mo. 632; *State* v. *Sterrin*, 78 N. H. 220; *People* v. *Diller*, 24 Cal. App. 799; *Woods* v. *State*, 15 Ala. App. 251.

In *United States* v. *Sischo*, 262 U. S. 165, it was decided that a master or owner of a vessel was required to list on his manifest smoking opium despite the fact that its importation was prohibited by penalty and forfeiture. The court below had held that such opium was not required to be listed on the manifest because it was not "merchandise" within the meaning of that word. The case was first affirmed by an equally divided court, (260 U. S. 697), but upon petition for rehearing (260 U. S. 701) it was reargued and reversed by

a unanimous court. In its opinion this Court said (p. 167):

> The collection of duties is not the only purpose of a manifest, as is shown by the requirement of one for outward bound cargoes and from vessels in the coasting trade bound for a port in another collection district, Rev. Stats. secs. 4197, 3116, and more clearly by the plain reason of the thing. A Government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand but whether it will allow the goods to enter at all. It would seem strange if it should except from the manifest demanded those things about which it has the greatest need to be informed—if in that one case it should take the chance of being able to find what it forbids to come in, without requiring the master to tell what he knows. It would seem doubly strange when at the same time it required any other person who had knowledge that the forbidden article was on the vessel to report the fact to the master. Act of January 17, 1914, c. 9, sec. 4, 38 Stat. 275, 276. It is not an answer to say that if the master knows that he has contraband goods on board he is subject to a penalty for that and probably will lie. The law naturally, one would think, would put the screws on to make him tell the truth, and in that way diminish the chance of his carrying contraband and help him to show his innocence if he has made a mistake. *Harford* v. *United*

> *States*, 8 Cranch, 109. We are of opinion that this policy, which has been expressed in terms in later statutes, (Act of May 26, 1922, c. 202, sec. 3, 42 Stat. 596, 598; Tariff Act of September 21, 1922, c. 356, secs. 401(c), 431, 584, 42 Stat. 858, 948, 950, 980;) governs also in the statutes to be construed here.

While the question of incrimination was not directly ruled upon by the court in the *Sischo case*, it can not be said that this Court overlooked the effect of the Constitution upon the law requiring the manifest of opium because one of the grounds urged in the petition for rehearing was the following (Pet. 6):

> Unless a clear interpretation of the word "merchandise" is secured from this court, we may find bootleggers and rum runners who have amassed considerable fortunes through the sale of prohibited liquor for beverage purposes, contending that they are excused from filing an income-tax return on the ground that the filing of this return would be forcing them to give evidence against themselves of the commission of a crime and pleading the alleged exemption granted them by the Constitution.

Presumably in answer to the above the Court said (p. 167):

> There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a prohibition and a tax. *United States* v. *Stafoff*, 260 U. S. 477.

Every constitutional objection which has been marshalled in this case to support respondent's claim of immunity from filing a tax return would apply equally well in the *Sischo case* against the requirement of a manifest of prohibited merchandise.

The *Sischo case* is not in conflict with the principle of the *Boyd case, supra.* In the latter case the paper involved differed totally in character from a manifest. It was an ordinary invoice—in every sense a private paper, being but a record of a private business transaction between private parties. This Court repeatedly emphasized its private character. On the other hand, the manifest in the *Sischo case* is clearly one of those very records required by law to be made for a governmental purpose which the Court in the Boyd case took pains to specifically except from the principle therein enunciated. A tax return, it is submitted, must also fall within the same excepted class of records, since it is essentially the same in character and purpose as a manifest. The customs laws requiring a manifest and the income tax laws requiring a return are strictly *in pari materia.* Generically, they are both revenue laws.

In *Harford* v. *United States,* 8 Cranch 109, cited with approval in the *Sischo case, supra,* it was held that articles whose importation was forbidden were nevertheless subject to the provisions of the customs laws prohibiting unlading without a permit.

In *United States* v. *Dalton,* 286 Fed. 756, it was held that the immunity from being compelled to give incriminating testimony secured by the Fifth Amendment to the Constitution has no application to declarations required on entries of goods under the customs laws.

Marks v. *United States,* 196 Fed. 476, upheld an indictment for manufacturing smoking opium without a license and bond long after the importation of such opium was absolutely forbidden.

The case of *United States* v. *Lombardo,* 228 Fed. 980 (affirmed on other grounds, 241 U. S. 73), relied upon by the court below, is not in point. There the District Court simply held that the immunity provision in the White Slave Act (Sec. 6) was not as broad as the privilege against self-incrimination granted by the Constitution. The question whether or not the report which the law required every person keeping an alien woman for purposes of prostitution to file with the Commissioner of Immigration was in the nature of a public record and therefore not within the protection of the Fifth Amendment was not considered or decided. Moreover the same judge who decided the *Lombardo case*, in deciding in the *Dalton case, supra,* that the Fifth Amendment had no application to the manifests required under the customs laws, stated that his decision in the *Lombardo case* was not in point on that question.

In the instant case the governmental right sought to be enforced is of the very highest—the right

given by the Constitution to lay and collect taxes. The nature of an income tax is such that it could not possibly be properly and fairly collected unless returns were made. The law has prescribed that they shall be made and official forms are distributed to taxpayers for that purpose. The Government has an interest in and a right to such a record from every taxpayer. Unless this is recognized it needs no argument to show that the purpose and operation of the Sixteenth Amendment and the laws carrying it into effect will be embarrassed, if not to a considerable extent defeated. There is no reason in law or logic which should require the making or production of the records involved in the cases cited—ships' manifests, for example, in the *Sischo case* and customs declarations in the *Dalton case*—and at the same time excuse the filing of a tax return expressly required by law for the purpose of stating the account for taxes between a taxpayer and his government, whether or not the income is derived from illegal sources. To hold otherwise would be to discriminate in favor of the law violator. Since the Circuit Court of Appeals makes no distinction between the return of a taxpayer all of whose income is derived from an unlawful source and one only part of whose income is derived from an unlawful source (in the instant case the facts show that respondent had income from both lawful and unlawful sources), a consequence of the decision below is that no person any part of whose income is derived from criminal operations need file any

return. The far-reaching effect of such a ruling upon the collection of taxes is apparent without argument. In effect the Government's right to collect its taxes would be at the mercy of the lawbreaker.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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APRIL, 1927.

41324—27——5

APPENDIX

Privy Council Appeal No. 119 of 1925.

The Minister of Finance, appellant; Cecil R. Smith, respondent.

From the Supreme Court of Canada. Judgment of the Lords of the Judicial Committee of the Privy Council delivered the 27th July, 1926.

Present at the hearing: Viscount Haldane, Lord Atkinson, Lord Darling, Lord Justice Warrington.

(Delivered by Viscount Haldane.)

This is an appeal from a judgment of the Supreme Court of Canada which had reversed the judgment of the Exchequer Court. The decision of the Exchequer Court, which was that of Audette J., was in answer to a question arising on a special case stated by direction of the Court itself, on an appeal by the respondent under the provisions of the Income War Tax Act, 1917, of the Dominion, as amended by subsequent legislation. This question was raised upon the narrative that the respondent Smith had, during the year 1920, gained certain profits within the Province of Ontario by operations in illicit traffic in liquor contrary to the existing Provincial legislation in that respect. Upon these profits Smith had been assessed for Income Tax, pursuant to the Income War Tax Act, 1917, and the amendments thereto. The validity of the assessment, in so far as it included the said profits as a basis for computing the tax as assessed, was in dispute. The question for the opinion of the

Court was: "Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said existing Provincial legislation in that respect 'income' as defined by s. 3, ss. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act." On this question the Exchequer Court decided that the profit arising from the illicit traffic within Ontario was income taxable under the Dominion statutes referred to, and dismissed an appeal brought to it by the respondent Smith.

The power of the Dominion Parliament to tax income is exercised under subhead 3 of Section 91, of the British North America Act, 1867. This extends to the raising of money by any mode or system of taxation. The Dominion Parliament is in such a matter of taxation *quasi* sovereign, and it is not open to serious doubt that under Section 91 the Dominion Parliament could tax the profits in question if it thought fit to do so, or that the fact that they arose from operations in traffic in liquor made illicit by the Provincial legislation of a Province constitute no hindrance to such taxation, if the Dominion Parliament had clearly directed it to be imposed. The only real question is one of construction, whether words have been used which impose a tax in such a case.

Section 3 of the Income War Tax Act, 1917, defines income as including the annual net profit or gain or gratuity being profit from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any trade, manufacture or business as the case may be,

whether derived from sources within Canada or elsewhere, and as including the indirect profits or dividends directly or indirectly received from money at interest upon any security or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the profit or gain from any other source. Section 4 imposes income tax upon the income so defined of any person carrying on business in Canada. The respondent was engaged during the year 1920 in illicit traffic in liquors in Ontario, contrary to the provisions of the Ontario Temperance Act and the amendments thereto, and the question is whether the Parliament of Canada has enacted that he is to be taxed on the profits from this.

In the Exchequer Court, Audette J. said that trading in liquor is not illicit or illegal at common law, and not *malum in se* but only *malum prohibitum*, and is not a criminal offence. It was, however, illicit and illegal by the laws of Ontario, and the present respondent could not invoke his own turpitude to claim immunity from paying taxes, and ask for discrimination in his favour, increasing the amount which might have to be levied on honest traders. It was not necessary to enquire, he added, into the source from which his revenue was derived, for the tax was by Section 4 of the Taxing Act imposed on the person. The illicit traffic in question was not a criminal offence in itself, and while illegal in Ontario, might not be so in other parts of Canada. The Provincial legislation could not derogate from the right of the Dominion under its Taxing Act, and the profits in question came within the ambit of the definition of income in that Act.

The Supreme Court took a different view. The learned Judges of that Court thought that such a business as that of the present respondent ought to be strictly suppressed, and that it would be strange if under the general terms of the Dominion statute the Crown could levy a tax on the proceeds of a business which a Provincial legislature, in the exercise of its constitutional powers, had prohibited within the Province. They held that the power, given to the Dominion Minister, by Section 7, to call for a return of the taxpayer's income vouched by documents and in detail, and for records which he was to keep, could be construed only as relating to what was legal, and could not extend to gains from crimes. They therefore allowed the appeal. Idington J. added that the "Bootleggers," as the profiteers under the Ontario Temperance Act had been called, were well known before the Taxing Act became operative, and that it was to be expected that if it had been intended to apply that Act to them express or very clear language would have been used. The judgment of the Exchequer Court was accordingly reversed, and this appeal is the result.

Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and

divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

There are certain expressions at the end of the judgment of Scrutton L. J., in *Inland Revenue Commissioners* v. *Von Glehn* (1920, 2 K. B. 553) as to the scope of the British Income Tax Acts. Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned, they need not be so. The question is never more than one of the words used.

They will humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside with costs and the judgment of the Exchequer Court restored.

The respondent will pay the costs of the appeal.

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Form 1126
U. S. INTERNAL REVENUE

CERTIFICATE OF INVENTORY

(To be filed with Collector of Internal Revenue with Income Tax Return)

FOR CALENDAR YEAR 1921

Or for period begun ....., 19....., *and ended* ....., 19.....

Name .....

Address .....

PRINCIPAL CERTIFICATE

Number of sheets submitted herewith.....

I swear (or affirm) that the closing inventory of the taxpayer named above, amounting to $....., was taken under my direction, and that to the best of my knowledge and belief is true and complete in every respect; that the method of pricing the raw material, work in process, and finished goods was at * .....; that I have carefully read all of the instructions on the reverse side of this form; that this inventory was taken in accordance therewith; and that the following-named persons whose separate certificates are subscribed hereon or attached hereto are the officers and employees under whose personal direction the various parts of this inventory were taken:

Name.	*Title or position.*	*Part of inventory taken.*	*Amount.*
			$
			$
			$
			$
			$
			$
			$

Sworn to and subscribed before me this ..... day of ....., 19.....

(Signature.)

(Signature of officer administering oath.) (Title.) (Title.)

*State "cost" or "cost or market, whichever is lower." If any other basis was used, describe fully, state why used and date on which inventory was last reconciled with stock.

SUBSIDIARY CERTIFICATE

I (or we), the undersigned employees of the taxpayer named above swear (or affirm) that I (or we) personally directed and observed the taking of the parts of the inventory set opposite my (or our) names, and, to the best of my (or our) knowledge and belief, is true and complete in every respect; that I (or we) have carefully read the instructions on the reverse side of this form and that the parts of the inventory for which I am (or we are) responsible was taken in accordance therewith.

Signature.	*Title or position.*	*Part of inventory taken.*

Sworn to and subscribed before me this ..... day of ....., 19.....

(Signature of officer administering oath.) (Title.)

INSTRUCTIONS.

This certificate of inventory must be submitted by all taxpayers engaged in a trade or business in which the production, purchase, or sale of merchandise of any kind is an income-producing factor.

The principal certificate will be signed by the taxpayer or an executive officer and the subsidiary certificate by officers and employees (such as department heads, superintendents, etc.) designated by the taxpayer or executive officer. If the taxpayer who fills in the principal certificate actually directs and observes the taking of the inventory, the subsidiary certificate need not be filled in.

In case there is not sufficient space on this form to enter the names of those directed to take the inventory, or it is not convenient for them to take the oath jointly, additional copies of this form should be used, but the oath of the principal officer need only be made on the first sheet, stating thereon the number of sheets submitted.

If the return has already been filed, the certificate should be sent to the collector of the district in which the return was filed.

SECTION 203 OF THE REVENUE ACT OF 1921.

That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

EXTRACTS FROM REGULATIONS 62.

ART. 1581. **Need of inventories.**—In order to reflect the net income correctly, inventories at the beginning and end of each year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor. The inventory should include raw materials and supplies on hand that have been acquired for sale, consumption, or use in productive processes, together with all finished or partly finished goods. Only merchandise title to which is vested in the taxpayer should be included in the inventory. Accordingly the seller should include in his inventory goods under contract for sale but not yet segregated and applied to the contract and goods out upon consignment, but should exclude from inventory goods sold, title to which has passed to the purchaser. A purchaser should include in inventory merchandise purchased, title to which has passed to him, although such merchandise is in transit or for other reasons has not been reduced to physical possession, but should not include goods ordered for future delivery transfer of title to which has not yet been effected.

ART. 1582. **Valuation of inventories.**—The act provides two tests to which each inventory must conform: (1) It must conform as nearly as may be to the best accounting practice in the trade or business, and (2) it must clearly reflect the income. It follows, therefore, that inventory rules can not be uniform but must give effect to trade customs which come within the scope of the best accounting practice in the particular trade or business. In order to clearly reflect income, the inventory practice of a taxpayer should be consistent from year to year, and greater weight is to be given to consistency than to any particular method of inventorying or basis of valuation so long as the method or basis used is substantially in accord with these regulations. An inventory that can be used under the best accounting practice in a balance sheet showing the financial position of the taxpayer can, as a general rule, be regarded as clearly reflecting his income.

The basis of valuation most commonly used by business concerns and which meets the requirements of the Revenue Act is (*a*) cost or (*b*) cost or market, whichever is lower. (For inventories by dealers in securities, see article 1585.) Any goods in an inventory which are unsalable at normal prices or unusable in the normal way because of damage, imperfections, shop wear, changes of style, odd or broken lots, or other similar causes, including secondhand goods taken in exchange, should be valued at bona fide selling prices less cost of selling whether basis (*a*) or (*b*) is used, or if such goods consist of raw materials or partly finished goods held for use or consumption, they should be valued upon a reasonable basis, taking into consideration the usability and the condition of the goods, but in no case shall such value be less than the scrap value.

Bona fide selling price means actual offerings of goods during a period ending not later than 30 days after inventory date.

The burden of proof will rest upon the taxpayer to show that such exceptional goods as are valued upon such selling basis come within the classifications indicated above, and he shall maintain such records of the disposition of the goods as will enable a verification of the inventory to be made.

In respect to normal goods whichever basis, (*a*) or (*b*) is adopted must be applied with reasonable consistency to the entire inventory. Taxpayers were given an option to adopt the basis of either (*a*) cost or (*b*) cost or market, whichever is lower, for their 1920 inventories, and the basis adopted for that year is controlling, and a change can now be made only after permission is secured from the Commissioner. Goods taken in the inventory which have been so interrungled that they can not be identified with specific invoices will be deemed to be either (*a*) the goods most recently purchased or produced, and the cost thereof will be the actual cost of the goods purchased or produced during the period in which the quantity of goods in the inventory has been acquired, or (*b*) where the taxpayer maintains book inventories in accordance with a sound accounting system in which the respective inventory accounts are charged with the actual cost of the goods purchased or produced and credited with the value of goods used, transferred, or sold, calculated upon the basis of the actual cost of the goods acquired during the taxable year (including the inventory at the beginning of the year) the net value as shown by such inventory accounts will be deemed to be the cost of the goods on hand. The balances shown by such book inventories should be verified by physical inventories at reasonable intervals and adjusted to conform therewith.

Inventories should be recorded in a legible manner, properly computed and summarized, and should be preserved as a part of the accounting record of the taxpayer. The inventories of taxpayers on whatever basis taken will be subject to investigation by the Commissioner, and the taxpayer must satisfy the Commissioner of the correctness of the prices adopted.

The following methods, among others, are sometimes used in taking or valuing inventories, but are not in accord with these regulations, viz:

(*a*) Deducting from the inventory a reserve for price changes, or an estimated depreciation in the value thereof.
(*b*) Taking work in process, or other parts of the inventory, at a nominal price or at less than its proper value.
(*c*) Omitting portions of the stock on hand.
(*d*) Using a constant price or nominal value for a so-called normal quantity of materials or goods in stock.
(*e*) Including stock in transit, either shipped to or from the taxpayer, the title of which is not vested in the taxpayer.

ART. 1583. **Inventories at cost.**—Cost means:

(1) In the case of merchandise on hand at the beginning of the taxable year, the inventory price of such goods.

(2) In the case of merchandise purchased since the beginning of the taxable year, the invoice price less trade or other discounts, except strictly cash discounts, approximating a fair interest rate, which may be deducted or not at the option of the taxpayer, provided a consistent course is followed. To this net invoice price should be added transportation or other necessary charges incurred in acquiring possession of the goods.

(3) In the case of merchandise produced by the taxpayer since the beginning of the taxable year, (*a*) the cost of raw materials and supplies entering into or consumed in connection with the product, (*b*) expenditures for direct labor, (*c*) indirect expenses incident to and necessary for the production of the particular article, including in such indirect expenses a reasonable proportion of management expenses, but not including any cost of selling or return on capital, whether by way of interest or profit.

(4) In any industry in which the usual rules for computation of cost of production are inapplicable, costs may be approximated upon such basis as may be reasonable and in conformity with established trade practice in the particular industry. Among such cases are (*a*) farmers and raisers of live stock (see article 1586), (*b*) miners and manufacturers who by a single process or uniform series of processes derive a product of two or more kinds, sizes, or grades, the unit cost of which is substantially alike (see article 1587), and retail merchants who use what is known as the "retail method" in ascertaining approximate cost. (See article 1588.)

ART. 1584. **Inventories at market.**—Under ordinary circumstances, and for normal goods in an inventory, "market" means the current bid price prevailing at the date of the inventory for the particular merchandise in the volume in which usually purchased by the taxpayer, and is applicable in the cases (*a*) of goods purchased and on hand, and (*b*) of basis elements of cost (materials, labor, and burden) in goods in process of manufacture and in finished goods on hand; exclusive, however, of goods on hand or in process of manufacture for delivery upon firm sales contracts (i. e., those not legally subject to cancellation by either party) at fixed prices entered into before the date of the inventory, which goods must be inventoried at cost. Where no open market exists or where quotations are nominal, due to stagnant market conditions, the taxpayer must use such evidence of a fair market price at the date or dates nearest the inventory as may be available, such as specific purchases or sales by the taxpayer or others in reasonable volume and made in good faith, or compensation paid for cancellation of contracts for purchase commitments. Where the taxpayer in the regular course of business has offered for sale such merchandise at prices lower than the current price as above defined, the inventory may be valued at such prices less proper allowance for selling expense, and the correctness of such prices will be determined by reference to the actual sales of the taxpayer for a reasonable period before and after the date of the inventory. Prices which vary materially from the actual prices so ascertained will not be accepted as reflecting the market.

ART. 1585. **Inventories by dealers in securities.**—A dealer in securities who in his books of account regularly inventories unsold securities on hand either (*a*) at cost or (*b*) at cost or market, whichever is lower, or (*c*) at market value, may make his return upon the basis upon which his accounts are kept; provided that a description of the method employed shall be included in or attached to the return, that all the securities must be inventoried by the same method, and that such method must be adhered to in subsequent years, unless another be authorized by the Commissioner. For the purpose of this rule a dealer in securities is a merchant of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell or hold securities for investment or speculation, and not in the course of an established business, and officers of corporations and members of partnerships, who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule. A dealer in securities is not entitled to the benefits of section 206 with reference to the gain from the sale of securities.

ART. 1586. **Inventories of live-stock raisers and other farmers.**—(1) Farmers may change the basis of their returns from that of receipts and disbursements to that of an inventory basis, which necessitates the use of opening and closing inventories for the year in which the change is made. There should be included in the opening inventory all farm products (including live stock), purchased or raised, which were on hand at the date of the inventory, but inventories must not include real estate, buildings, permanent improvements, or any other assets subject to depreciation.

(2) Because of the difficulty of ascertaining actual cost of live stock and other farm products, farmers who render their returns upon an inventory basis may at their option value their inventories for the current taxable year according to the "farm-price method" which provides for the valuation of inventories at market price less cost of marketing. If the use of the "farm-price method" of valuing inventories for any taxable year involves a change in method of pricing inventories from that employed in prior years, the opening inventory for the taxable year in which the change is made should be brought in at the same value as the closing inventory for the preceding taxable year. If such valuation of the opening inventory for the taxable year in which the change is made results in an abnormally large income for that year, there may be submitted with the return for such taxable year an adjustment statement for the preceding year based on the "farm-price method" of valuing inventories; upon the amount of which adjustments the tax, if any be due, shall be assessed and paid at the rate of tax in effect for such preceding year.

(3) Where returns have been made in which the taxable net income has been computed upon incomplete inventories, the abnormality should be corrected by submitting with the return for the current taxable year a statement for the preceding year in which such adjustments shall be made as are necessary to bring the closing inventory for the preceding year into agreement with the opening complete inventory for the current taxable year. If necessary to reflect the income, similar adjustments may be made as at the beginning of the preceding year, and the tax, if any be due, shall be assessed at the rate of tax in effect for such year.

ART. 1587. **Inventories of miners and manufacturers.**—A taxpayer engaged in mining or manufacturing who by a single process or uniform series of processes derives a product of two or more kinds, sizes, or grades, the unit cost of which is substantially alike, and who in conformity to a recognized trade practice allocates an amount of cost to each kind, size, or grade of product which in the aggregate will absorb the total cost of production, may use such allocated cost as a basis for pricing inventories, provided such allocation bears a reasonable relation to the respective selling values of the different kinds of product.

ART. 1588. **Inventories of retail merchants.**—Retail merchants who employ what is known as the "retail method" of pricing inventories may make their returns upon that basis, provided that the use of such method is designated upon the return, that accurate accounts are kept, and that such method is consistently adhered to unless a change is authorized by the Commissioner. Under this method the goods in the inventory are ordinarily priced at the selling prices and the total retail value of the goods in each department or of each class of goods is reduced to approximate cost by deducting the percentage which represents the difference between the retail selling value and the purchase price. This percentage is determined by departments of a store or by classes of goods, and should represent as accurately as may be the amounts added to the cost prices of the goods to cover selling and other expenses of doing business and for the margin of profit. In computing the percentage above mentioned, proper adjustment should be made for all mark-ups and mark-downs.

A taxpayer maintaining more than one department in his store or dealing in classes of goods carrying different percentages of gross profit should not use a percentage of profit based upon an average of his entire business, but should compute and use in valuing his inventory the proper percentages for the respective departments or classes of goods.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 851.

UNITED STATES OF AMERICA, PETITIONER,

versus

MANLY S. SULLIVAN, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

No opinion was rendered by the District Court, sitting at Charleston. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 15 F. (2d) 809.

JURISDICTION.

The judgment of the Circuit Court of Appeals to be reviewed was entered October 25, 1926. (R. 117.) Petition for certiorari was filed January 25, 1927, under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936). The Petition was granted March 7, 1927.

QUESTIONS PRESENTED.

This case involves the following questions:

I. Does not Section 223 of the Revenue Act of 1921, so far as it requires a return from one whose income is derived from a violation of the Criminal Law, conflict with that provision of the Fifth Amendment that no person shall be compelled, in any criminal case, to be a witness against himself?

II. Did Congress intend the direct proceeds of crimes against the laws of the United States to be considered as income within the meaning of the Revenue Act of 1921?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

That provision of the Fifth Amendment which states—

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Revenue Act of November 23, 1921.

STATEMENT.

Respondent was, upon his motion, simultaneously, tried upon two indictments in the Eastern District of South Carolina. One indictment charged perjury in connection with an income tax return for the year 1919, in violation of Section 125 of the Criminal Code. The second indictment was divided into three counts. Respondent was tried at the January term, 1926, of the District Court, at Charleston, South Carolina, and was acquitted on the first indictment, and on counts one and two of the second indictment, but was convicted on count three of the second indictment which charged that Respondent did, unlawfully, violate Section 253 of the Act of November 23, 1921, in that for the year 1921 he had a net income in a large amount, to-wit: the sum of Ten Thousand ($10,000.00) Dollars, profits from his automobile agency and from his business of selling illegal beverages, and that he wilfully refused to make any return whatsoever. The only evidence that Respondent received any income or gain for the year 1921 showed that such income or gain, if any, was derived solely from the sale of illegal beverages. There was no testimony of any gain from legitimate sources, and this the Government admitted in its brief in the Circuit Court of Appeals. See pages 32 and 33 of the Government's Brief in the Circuit Court, which states:

> The Transcript of Record shows that the Defendant was engaged in a legitimate business in the year 1919, to-wit: the tractor business as well as he was engaged in an illegitimate business; but the Record does not show *any* legitimate business in which he was engaged during the years 1920 and 1921. The defendant admitted that he was only engaged in an illegitimate business during these two years; *therefore, there is no contention by the Government from any legitimate business on which to live during the year 1921.*

Respondent admits all other allegations in the Government's Statement of the case.

SUMMARY OF ARGUMENT.

POINT I.

Section 223 of the Revenue Act of 1921 in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law is in conflict with the fifth amendment to the Constitution.

POINT II.

The income tax law does not grant immunity from prosecution.

POINT III.

The question of immunity is properly before this court.

POINT IV.

Direct proceeds of crime against the laws of United States cannot be considered as income within the meaning of the income tax law of 1921.

ARGUMENT.

POINT ONE.

Section 223 of the Revenue Act of 1921, in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law, is in conflict with the fifth amendment to the Constitution.

Section 223 of the Revenue Act of 1921 requires a

return under oath showing specifically the items of income. Section 1300 requires the taxpayer to comply with such regulations and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary, may from time to time prescribe. The Commissioner of Internal Revenue, with the approval of the secretary, has promulgated regulations, among which is the requirement that the taxpayer shall state the kind of business in which he is engaged, and such a statement is required by the form of income tax return issued by the Commissioner.

Thus to comply with this law, the defendant in this case must have executed and filed a return in which he must have stated under oath that he was engaged in the business of violating the National Prohibition Act. It would be hard to imagine a more categorically self-incriminating statement. For failing to file such a return, the defendant has been indicted. The *unanimous opinion* of the Circuit Court of Appeals that the filing of such a return would make the defendant a witness against himself in a criminal case within the meaning of the Fifth Amendment to the Constitution must, it is submitted, be sustained.

At the inception of this argument, we are confronted by the fact that in this case, the protection of the Fifth Amendment is being invoked by a confessed violator of the National Prohibition Law, to save him from punishment for having failed to file a return as required by the Income Tax Law. This raises the question whether the criminal is to be exempted from paying income taxes on his criminal gains, while the man engaged in legitimate business shall be compelled to pay such taxes.

Our answer to this question is that in the first place, the protection of the Fifth Amendment would not exempt the citizen from *paying* his income tax, but merely from filing a self-incriminating return. The Income Tax Act itself provides for the assessment and collec-

tion of taxes by governmental agents where a citizen fails to file a return (Section 250 (d)), so that the Act itself provides the machinery for collecting such taxes in a case such as that now before this Court, and the record shows that such machinery was put into operation in this very case. (R. 7.)

In the second place, whether or not the protection of the Fifth Amendment would, as a practical matter, hamper the government in the enforcement of the Income Tax Law, and tend to exempt criminals from the payment of income taxes, it is respectfully submitted that the question here involved is far more deep, fundamental, and far-reaching than the collection of taxes from criminals. It involves one of the fundamental privileges of citizens of this Republic guaranteed by the Constitution itself. It is true that in this case, the privilege happens to be asserted by a confessed violator of the Prohibition Law. This fact makes the case a hard one. The tendency would naturally be to uphold the provisions of the tax law, and to deny protection to the criminal. But it is just such a case that comes within the old maxim that "hard cases make bad law". The fundamental principles involved in this case are far more important than the mere question of taxation. The decision which must be made cannot be limited to criminals and income tax cases. The principle to be established is clear cut and inescapable: Has Congress the power, in view of the Fifth Amendment, to compel a citizen to file with the government a statement under oath of a self-criminating character.

The language of the Fifth Amendment pertinent to this inquiry is:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

The obvious intent of this provision is that no one

shall be compelled to be the means of exposing his own criminality. This privilege is for the protection of the innocent as well as the guilty, and is intended to prevent for all time anything in the nature of inquisitorial proceedings to compel confessions of crime. Such protection is an essential part of the liberties of a free people, and should be jealously guarded from encroachment by the legislative branch of the government.

In *United States* v. *Boyd*, 116 U. S. 616, this Court said, page 632:

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In *Counselman* v. *Hitchcock*, 142 U. S. 547, this Court said, in commenting on this provision of the Constitution, page 562:

> "This provision must have a broad construction in favor of the right which it was intended to secure."

Again, in the same opinion, this Court adopted the language of the Massachusetts Court in *Emory's Case*, 107 Mass. 172, quoting from that opinion, page 573, as follows:

> "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examina-

> tion in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor such disclosure would be an accusation of himself within the meaning of the constitutional provision."

It is submitted that this language is a sound and accurate exposition of the purpose and effect of the Fifth Amendment, and that the instant case comes well within that language.

The decisions of this Court were summarized by Judge Day, then one of the judges of the 6th Circuit, in *McKnight* v. *U. S.*, 115 Fed. 972, at 981:

> "A perusal of the decisions of the Supreme Court shows that no constitutional right has been the subject of more zealous care than that which protects one accused of crime from being compelled to give testimony against himself. The right to such protection existed at the common law, and was carried into the Constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment."

A very pertinent warning against encroachments on this constitutional right was sounded by this Court in the *Boyd case*, *supra*, at page 635:

> "But illegitimate and unconstitutional practices gets their first footing in that way, namely: by silent

approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

This warning is particularly opportune at this time, when the legislative branch of the government, by innumerable laws, is steadily encroaching upon the individual liberties of the citizens of this country. Business and personal conduct are being regulated, supervised and inspected in detail. Reports of all kinds are required to be made, and books to be kept for the inspection of the government. So far have these practices gone, that there is little of either liberty or privacy left to the citizens. Such procedure is bad enough when it violates no positive constitutional safeguard. When it does, as in this case, we respectfully submit that the Court should intervene.

If a private citizen can be compelled to state under oath that he is engaged in an illegal business, and can be compelled to keep records of such business for the inspection of governmental agencies, it is only a step further to require the citizens to keep diaries under oath, showing all their daily activities in regard to any matter within the power of Congress, and to file or submit such diaries to governmental inspection. In short, if the position of the government is approved in this case, will not the foundation be laid for governmental supervision, regulation and abuse similar to that in France and Russia before their revolutions? Will not the path be cleared for whittling away all the constitutional guarantees embraced in the so-called "Bill of Rights"?

The opinion of the Circuit Court of Appeals in this case, holding squarely that Section 223 of the Income Tax Law, as applied to this case, is unconstitutional, is clear and convincing, logically and necessarily following from the authorities there relied upon. The only other opinion which could be found on this point is *Steinberg* v. *U. S.*, 14 Fed. 2nd 564 (Cir. Ct. App., 2nd Cir. 1926). That was a prosecution for filing a false and fraudulent return, the defendant having failed to report income derived from violation of the prohibition law. A conviction was set aside on the ground that certain evidence had been improperly admitted. In a separate concurring opinion, Judge Manton said, page 568:

> "In the case of criminal gains, a taxpayer may refuse to incriminate himself, and the government is powerless in securing the detailed information of his return; for the Fifth Amendment of the Constitution means that a person shall not be compelled when acting as a witness in any investigation, to give testimony that might tend to show that he had committed a crime. *Counselman* v. *Hitchcock*, 12 S. Ct. 195, 142 U. S. 547, 39 L. Ed. 1110. The protection of the Fifth Amendment is not confined to criminal cases, but extends to any investigation by an administrative officer. * * * If the recipient of this kind of income is obliged to make known its amount and the source, when it is received in sufficient sums to be beyond the exempt minimum, he is compelled to state under oath information that he is not obliged to give, if he chooses to exercise his right of protection of the Fifth Amendment."

In *Peacock* v. *Pratt*, 121 Fed. 772 (Cir. Ct. App., 9th Cir. 1903), the income tax law of Hawaii was under consideration. Its possible conflict with various constitutional provisions not involved in that case was urged. The court declared that if the act required the production of evidence in violation of the Fifth Amendment, the taxpayer might invoke that amendment when

called upon to produce such evidence, since the constitutional limitations must be read into the terms of any law that deals with those subjects.

Thus whenever this question has been presented to the courts, the constitutional guarantee has been upheld.

Review of Supreme Court Decisions.

To review the Supreme Court decisions pertinent to this inquiry, the case of *U. S.* v. *Boyd*, 116 U. S. 616 (1885), holds that one cannot be compelled to produce his private books and papers, that this provision should be liberally construed, and warns against stealthy encroachments on this privilege.

Counselman v. *Hitchcock*, 142 U. S. 547 (1891) held that the Fifth Amendment applied to investigations before a grand jury. The opinion in that case is very complete and carefully considered. The court reviewed a number of state decisions limiting the scope of state constitutional provisions similar to this one, rejected the doctrine of these cases, and stated that this provision must have a broad construction in favor of the right which it was intended to secure.

The instant case comes well within the rule of the *Counselman Case*. Section 1300 of the Act of 1921 requires the taxpayer to keep such records and render under oath such statements and returns as may be prescribed. The regulations, though prescribing no particular kind of records, require accounting records sufficient to show gross income, deductions, etc. (Regulation 62, Article 23.) The statute further provides (Act of 1918, Section 1305, not repealed by 1921 Act) that the commissioner or his agent may examine the person rendering the return under oath. The language of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself has re-

ceived a liberal construction, and, as was said in the *Counselman case*, the object of the Fifth Amendment was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony showing that he himself has committed a crime. The requirement that returns showing sources and amounts of income received must be made, makes such returns the first step *in an investigation*. Since all information must be given under oath, it follows that the *taxpayer* becomes a *witness*. Besides the privilege is not limited to testimony as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate (*Boyd* v. *U. S., supra.*)

In Brown v. *Walker*, 161 U. S. 591 (1895), it was held that if the witness is given absolute immunity from prosecution, such immunity meets the requirement of the Amendment, and the witness may be compelled to testify. The Court cited with approval *Emery's Case*, 107 Mass. 172, and *Cullen* v. *Com.*, 24 Gratt. 624, stating that the opinion in the *Counselman Case* placed great reliance on these cases.

In *Hale* v. *Henkel*, 201 U. S. 43 (1905), Hale was summoned as a witness under a *subpoena duces tecum* requiring the production of certain corporate books. He refused to produce them on the ground that they might tend to criminate him. He was informed of the statutory immunity protecting him, so that his personal privilege was not involved. It was held that he must testify. The exact ground of the decision is not entirely clear. It seems to be partly that the term "person" used in the Fifth Amendment would not include a corporation, so that the privilege would not extend to a corporation and partly that the witness here was attempting to assert the privilege to prevent the crimination of

another party, the corporation, while the privilege was a purely personal one, limited to matters which would tend to criminate the witness himself. Both of these propositions are probably sound, and neither have any application to the case now before this court, since the defendant in this case is an individual and asserts the privilege to protect himself against matters tending to criminate himself.

The doctrine of *Hale* v. *Henkel* was extended in *Wilson* v. *U. S.*, 221 U. S. 361 (1910), to compel an officer of a corporation to produce its books although their production would tend to criminate him, and although he was not protected by immunity. The Court relies first on the doctrine that the constitutional privilege does not extend to a corporation, partly on the fact that the corporation offered no objection and asserted no privilege, and partly on a declaration by the Court the privilege did not extend to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.

This doctrine, it is submitted, is an extremely novel one, and one which practically wipes out the constitutional provision. The very purpose of the constitutional provision is to limit the power of Congress so that it cannot do the things forbidden by the Constitution. Under this holding, all that Congress need do is to require records to be kept on subjects within the scope of its powers, to establish restrictions, and such records must be produced, the Fifth Amendment notwithstanding. In short, Congress may, by legislation, nullify the Fifth Amendment.

After citing the cases of *State* v. *Donovan*, 10 N. D. 203, and *State* v. *Davis*, 108 Mo. 666, the first holding that the privilege did not apply to a druggist who was

required by law to keep a record of the sale of intoxicating liquors, the second holding that it did not apply to a druggist who was required by law to preserve prescriptions, the Court said:

> "The fundamental ground of decision in this class of cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him."

With all due deference to the learned Justice who wrote this opinion, it is respectfully submitted that this particular language is loose and dangerous. No limit whatever is placed upon the power of the legislature. Just what is meant by the "character" of the books and papers, "and the rules of law applicable thereto" is not clear. No limits are placed upon the power of the "examining authority". In fact, under this language it could be argued that the legislature had unrestricted power to compel the keeping and production of books and papers, and that as to them, the Fifth Amendment has been wiped out.

Even the holding and the language of this case, however, would not cover the facts of the case now before this Court. It would possibly apply to the books and papers required by the Income Tax Law to be kept and produced by the defendant in this case. But he was not charged with having failed to keep or produce books. The charge in the instant case is failure to file a return which would have required him to criminate himself. This case, then, is distinguishable from the *Wilson case*, and it is respectfully submitted that the doctrine of that case should not be extended. The attention of the Court is respectfully called to the clear, well reasoned and vigorous dissent of Mr. Justice McKenna.

In *Baltimore etc. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612 (1910), it was held that a railroad company cannot avoid filing monthly reports as to hours of labor, although they might tend to criminate it. This is within the principle of *Hale* v. *Henkel*, *supra*, that a corporation is not within the protection of the Amendment.

In *U. S.* v. *Sischo*, 262 U. S. 165, (1923), the Fifth Amendment was not considered.

In *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924), the court held a bankrupt protected by this Amendment as to his books and papers, saying that the privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought, but applies wherever the answer might tend to subject to criminal responsibility him who gives it.

This is the most recent pronouncement of the Supreme Court on this point, and it strongly supports our contention.

The government relies upon a number of state and district court decisions. The State court decisions should carry no weight against the decisions of this Court reviewed above.

As to the District Court decisions; two by the same judge, *U. S.* v. *Lombardo*, 228 Fed. 980 (Dist. Ct. W. D. Wash. 1915), and *U. S.* v. *Dalton*, 286 Fed. 756 (Same court 1923), are hard to reconcile. In the former, the defendant was indicted for failure to file a statement required as to keeping alien women for purposes of prostitution. A demurrer to the indictment was sustained on the ground that the requirement was in conflict with the Fifth Amendment. The Court very strongly upholds the inviolability of the Fifth Amendment.

In the latter case, the defendant had failed to declare and enter certain liquor imported in violation of law. The court upheld the requirement, simply saying

the "Fifth Amendment has no application where parties or goods seek admission into the United States", and that the Lombardo case was not in point. This was a district court decision, and gives no evidence of careful consideration.

In *U. S. v. Mulligan*, 268 Fed. 893 (Dist. Ct. N. D. N. Y., 1920), the defendant was indicted under the Lever Act for refusing to allow government agents to inspect his place of business, books, etc. A demurrer was overruled, the court holding that the privilege of the Fifth Amendment did not apply, relying practically entirely on the existence of a state of war to justify a suspension of the Fifth Amendment. In the first place, even a state of war cannot suspend the constitutional guarantees. *U. S. v. Cohen Grocery Company*, 255 U. S. 81. In the second place, it is just exactly against such inquisitorial pryings that this Amendment was directed—prying into places of business, records and books, and demanding reports. It was from these that the citizens of this Republic were to be freed by the Fifth Amendment. It is, therefore, submitted that the holding of this case is unsound, and further that it is not in point with the instant case, where defendant is charged with having failed to sign under oath and file a self-criminating statement.

In *U. S. v. Sherry*, 294 Fed. 684 (Dist. Ct. N. D. Ill., 1923), the defendant was indicted for an alleged violation of the Anti-Narcotic Act. He moved for an order returning to him certain prescriptions taken by government officers from his books. The Act required druggists to preserve such prescriptions for inspection. The motion was denied, the court relying on the *Wilson case*, and declaring that records required by law to be kept are not covered by the Fifth Amendment.

The language of the *Wilson case* relied upon has been discussed above, and it is submitted that this case, too, is not in point, since it involved papers already in existence, and did not require a citizen to sign a sworn statement of his criminality.

The Rule as to Public Records.

The government, in its brief, Point IV, relies largely upon the rule as to public documents, citing Wigmore on Evidence, Sec. 2259 (c). There is a great difference, it is submitted, between public official books, the property of the State, and records required by law to be kept by a private citizen holding no public office. As to the former of these, it might well be urged that by accepting the public office involving the custody of these documents, the official waives his privilege. As to the second, the records are the private papers of a private citizen, and are given a so-called "*quasi*-public" character only by legislative fiat. If such decisions are sound, the constitutional provision is committed to the legislature, and can be done away with at any time by a mere legislative declaration that papers of a particular kind shall be executed and filed.

Attention is called to the fact that not a single Supreme Court case is cited by Wigmore, and that he cites state cases *contra* to his contention. With due respect to Professor Wigmore, it is submitted that his reasoning in regard to the State not requiring the officer to commit the crime and the crime being due to the party's own election is astonishing. We know of no crimes which are compelled by the State, and this reasoning would exempt from the protection of the Fifth Amendment information as to all crimes voluntarily committed.

The quotation from the *Boyd case*, page 51 of the government's brief, related not to the Fifth Amendment, but to unreasonable searches and seizures. It was mere dictum, and the Court cited no authority in support of its statement.

The quotation from the *Wilson case*, page 52 of the government's brief, was also a dictum. The papers involved in that case were the private correspondence of

the corporation, not required by law to be kept. As pointed out above in the discussion of that case, its reasoning and the exact basis of its decision is not clear, but rests largely upon the principle that corporations are not within the protection of the Fifth Amendment. The other cases cited by the government are State decisions, or such Federal decisions as have been discussed herein.

The public official document rule, we submit, is probably sound. Its extension to private records required by law to be kept is unsound, and a dangerous encroachment upon a fundamental constitutional guarantee. But even if sound, it would not cover the facts of this case, since no records in existence are involved. The question is whether a private citizen can be compelled to prepare, execute under oath, and file with the government a statement tending to criminate himself.

The argument of the government that the return could have been so prepared as to have no tendency to criminate himself is, we submit, without merit. If the taxpaper told the truth, as he was bound to do, and stated that his business was the sale of liquor, or "bootlegging", surely he would criminate himself. If he stated it as "beverages" as suggested, which would be a circumvention of the truth to say the least, surely even that would tend to criminate him. In these days of governmental under cover men and intense prohibition activity, such a statement would invite an investigation as to the nature of his so-called "beverages". Furthermore, it is hardly in keeping with a sound public policy for the government itself to advocate that its citizens shall circumvent the truth or shall state anything less than "the truth, the whole truth, and nothing but the truth".

The argument that such a return constitutes a public or *quasi* public document is not sound. In the first place, there is no such document, it never having come into existence. In the second place, under the law, such *return becomes a public record only after the tax thereon*

has been determined by the Commissioner (Sec. 257). Thus when first filed, it is not a public record.

The argument that the taxpayer should have filed some return, omitting whatever tended to criminate him would mean that in this case no return should be filed. There is no evidence that the defendant received any income during 1921 from any source other than the violation of the Prohibition Law. If the requirement of the Income Tax Law as to such income is unconstitutional, such requirement is void, and no return need be filed.

Conclusion.

In conclusion on this point, we submit that the issue is well defined in this case: whether, in view of the Fifth Amendment, a private citizen can be compelled to execute under oath a statement criminating himself, and to file such statement with the government; that such a requirement is neither within the official public document rule, nor within the unsound extension of that rule to cover records "required by law to be kept"; that if the power of Congress in this respect is sustained, the Fifth Amendment will have been entirely nullified. For these reasons, we respectfully submit that the unanimous decision of the Circuit Court of Appeals should be sustained.

Point II.

The Income Tax Law Does Not Grant Immunity From Prosecution.

The government admits in its brief Point IV, page 50, that the Income Tax Law does not extend to one making incriminating disclosures in tax returns immunity coextensive with the protection afforded by the Fifth Amendment. Thus this point needs no argument. Absolute immunity must be afforded.

Counselman v. *Hitchcock*, 142 U. S. 547.
Brown v. *Walker*, 161 U. S. 591.
McCarthy v. *Arndstein*, 266 U. S. 34.

Point III.

The Question of Immunity is Properly Before This Court.

Respondent refused to file an income report for the year 1921, feeling that to do so would subject him to criminal prosecution by the Government (R., 11, 12, 18, 27).

It is true that upon taking the stand in the District Court, Respondent testified to his illicit traffic in liquor. It should be noted, however, that Respondent was not represented by Counsel in this case (R. 4), and further that he was not notified of his constitutional privilege by the Court.

At the time the return in this case should have been filed, if it should have been filed at all, the Respondent was entitled to assert his constitutional guarantee against self-incrimination. The trial in this case took place in 1926, and his testimony in that trial cannot by relation back constitute now a waiver of his constitutional guarantee which he had and asserted by not filing a return. Such constitutional guarantee could be waived only by filing a return without protest. *Evans* v. *O'Connor*, 174 Mass. 287; *People* v. *Lucas*, 78 N. Y. Supp. 578.

Further the Government did not raise this point in the Circuit Court of Appeals and should, therefore, be precluded from raising it now, especially in view of its request in its Petition for *Certiorari* that the far-reaching questions involved be decided.

By virtue of the Act of March 3, 1915, and Section 10 of the Act of February 13, 1925, it is the duty of appellate Courts to consider cases regardless of the form in which they are brought up, and to return such judgment on the record as law and justice require (*Maukey*

v. *Adams*, Circuit Court of Appeals, 5th, No. 4845, decided March 17, 1927, not reported). Also *Robinson* v. *United States*, 290 Fed. 756.

Point IV.

Direct Proceeds of Crimes Against the Laws of United States Cannot be Considered as Income Within the Meaning of the Income Tax Law of 1921.

Section 213 of the Act of 1921 says:

> "Income includes gains, proceeds and income derived from salaries, wages or compensation, personal service * * * of whatever kind and in whatsoever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of an interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatsoever."

As quoted in the Statement of Case by Respondent, the Government in its Brief in the Circuit Court of Appeals, admitted that there was no contention by the Government that the Defendant made *any* money from *any* legitimate business during the year 1921, with which year we only are interested.

The question now is, "Did Congress intend to tax the gains of crime as income under the above Act?"

It is intended by the Government that since the word "lawful" was used at one point in the Revenue Act of October 3, 1913, and has been omitted in subsequent Revenue Acts, that the intent of Congress as to the question, of taxing gains from crimes, is clearly expressed. However, if the Section is read as an entirety and not an isolated point picked out on which to build

an argument, it will be seen that this contention of the Government is hyper-technical.

The Act reads:

> "That subject only to such exemption and deduction as are hereinafter allowed, the net income of a taxable person is included in gains, profits and incomes derived from salaries, wages, or compensation for personal services, of whatever kind, and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property. Also from interest, rent, dividends, securities, or the transaction of any *lawful* business carried on for gain or profit, or gains or profits, and *income derived from any source whatever* * * *."

Clearly the above Act is as all-inclusive as subsequent ones, for immediately following the phrase, "Or the transaction of any *lawful* business carried on for gain or profits", the Act goes on to say, "Or gains or profits and income derived from any source whatever". The fact that one word of a long Act has been dropped cannot furnish a foundation for the argument of the Government. There is nothing to show that this word was not inadvertently dropped or that it was a mere surplusage.

It seems most doubtful that gains from crime could have been intended to be included in the meaning of "income" as used in the Act of 1921. It seems equally doubtful that the word "income", as used in the 16th Amendment, was intended to have any such meaning. The word, as there used, means no more than it does in common speech, and is not to be extended by loose construction. As was said in *Eisner* v. *Macomber* (1920, 262 U. S. 189), while the 16th Amendment gave Congress the power to levy and collect taxes *on incomes from whatever source derived*, without apportionment among

the several States * * * it has been repeatedly held, this did not extend the taxing power to new subjects. Citing *Brushaber v. Union Pacific Rg.*, 240 U. S., p. 1, the Court further said, "It becomes essential to distinguish between what is and what is not income as the term is there used and to supply that distinction as cases arise according to truth and substance, without regard to form. Congress cannot by any definition it might adopt, conclude the matter, since it cannot by legislation alter the Constitution from which alone it derives its power to legislate * * *. "*Income may be defined as the gain derived from capital, from labor, or from both combined*, provided it be understood to include profit gained through a sale or conversion of capital assets." It seems unreasonable that "criminal effort" should be considered as "labor", or that the whiskey purchased for unlawful sale and in which no property right exists (Prohibition Act, Title II, 25) should be considered as "capital".

If the above definition of "income" be sound and it has never been questioned to date, and if the reasoning in regards it be sound, then it follows that such unlawful gains as the evidence tended to show the defendant receiving in 1921, are not income within the meaning of the Act of 1921.

As to this point, the Honorable Charles Hough in the case of *Steinberg v. United States, supra*:

> "That the winnings of a professional gambler, the loot of burglar, the bribes of the dishonest official, the wages of a prostitute or the profits of any criminal commerce should *not* be regarded as income, but should for reasons of public policy be regarded as beneath the contempt of the law, is a proposition *not without attraction*. If they constitute income within the meaning of the law it must follow that in the language of Sec. 214 of the Act, the 'net' or taxable portion thereof must be reached by deduction of 'all the ordinary and necessary expenses paid or incurred during the taxable year in

carrying on trade or business; wherefore, whoever for profit maintains a saloon, brothel, or fence would have good right to claim as lawful deductions those bribes for 'protection' which are a notorious part of the profitable exercise of such vocations. The moral degradation arising from endeavor by law to collect a necessarily lawful tax out of occupations by equal necessity unlawful, corrupting, and immoral *may well give one pause.*"

In the same case the Honorable Martin T. Manton said:

"* * * Again assuming that he was entitled to deduction for ordinary and necessary expenses as provided in Sec. 214 of Act of 1921 is it possible that the Government is to make allowances for expenses and loss sustained in this illegitimate trade. Assuming that bribery was a means of carrying on the trade, is the government to make allowances for bribing its officials? And if the business flourishes is the government to share in his prosperity? It is hard to conceive of Congress ever having had in mind that the government be paid a part of the income, gains, or profits derived from successfully carrying on this crime or entering into a computation with the person engaged in this unlawful business to ascertain how and to what extent he shall be taxed. The criminal code provides punishment for those who violate the Volstead Act and its various provisions, and if severer punishment should be inflicted, it is a matter for Congress to legislate. It is incredible to believe that it was intended that a bootlegger be dignified as a taxpayer for his illegal profit so that the government may accept his money for governmental purposes as it accepts the money of the honest merchant taxpayer * * *. Therefore, I conclude that the reversal should also *order the dismissal of the indictment.*"

The learned Judge thus taking the full step on the point contended for and the step which the other Justices in the case seemed seriously to be considering taking.

Further the Supreme Court of Canada interpreting a Statute much like ours has recently held that the gain from bootlegging, carried on in violation of the Ontario Statutes, is not to be considered as income, the Court said:

> "The assertion of such an intention or purpose would be such a novelty in the way of expressing income tax acts here and elsewhere, that *I should expect to find the intention or purpose expressed in such clear and unambiguous terms as the law has uniformly required all tax acts to be so that there can be no doubt as to their meaning.* The rule in that regard is well stated in Hardcastle's Statute Law, 3rd Edition, page 126, as follows: But for certain purposes express language in statute is absolutely indispensable. And of these specified the first named is that of imposing a tax (Indington, J.). The real question, however, is whether we should place on the Statute a construction which implies that Parliament intended to levy this income tax on the proceeds of crime or on the gain derived from a business which cannot be carried on without violating the law. Such a business should be strictly suppressed and it would be strange indeed if under the general term of the statute the Crown in right of the Dominion would levy a tax on the proceeds of a business which a provincial legislature in the exercise of its constitutional powers has prohibited within the province.
>
> "Moreover what may be called the machinery clauses of the Act (Sec. 7 and *seq.*) clearly show that it never was contemplated that an income tax would be levied on the gains derived from illicit business or from the commission of crime. Thus every person liable to taxation must make to the Minister on or about April 30th in each year a return of his total income during the last preceding year. If the Minister, in order to be able to make an assessment or for any other purpose, desires any information or additional information he may demand it by registered letter and the taxpayer is obliged to furnish this information within thirty days. The

Minister may also require the production of any letters, accounts, invoices, statements, books, or other documents or he may have an inquiry made by the officer thereunto authorized by him and if the taxpayer fails or refuses to keep adequate books or accounts for income tax purposes the Minister may require him to keep such records and accounts as he may prescribe. Any information thus obtained is treated as confidential and its divulgement prohibited."

"I think the inference is irresistible that the taxpayers return of income, the additional information which may be demanded by the Minister, the books and accounts which may be inspected, and the accounts and records which the Minister may require the taxpayer to keep are all in respect of businesses which may be legally carried on. It is difficult to conceive of the Minister requiring criminals to furnish information as to profits derived from the commission of crime or demanding from them the keeping of books or records of their illicit and criminal operations. Furthermore, if the gains derived from crime are within the contemplation of a statute then the expenses incurred in making these gains, i. e., in the employment of criminal agents would be chargeable as deductions against these gains and as to all information furnished by the wrongdoer there would be a promise of secrecy for his protection. It is impossible to believe that anything like this was contemplated by the Parliament (Magnault, J.)."

Smith v. *The Minister of Finance*, 2 Dom. Law Rep. (1925) 1137.

While this case was subsequently reversed by a judgment of the Lords of the Judicial Committee of the Privy Council, it, nevertheless, shows that the view contended for has had strong backing by high Courts, both of this Country and of Canada, and it cannot well be said that the contention is without merit.

The opinion of the Privy Council is surprisingly

short, and there is a noticeable paucity of reasoning. The result is reached mainly on the ground that the Prohibition Law, there involved, was not a Dominion Law, but simply a Provincial Law.

The Court says:

> "Construing the Dominion Act literally the profits in question although by the law of the particular Province they are illicit came within the words employed. Their Lordships can find no valid reasoning for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. *Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Province.*"

Further their Lordships were not confronted by the provision of a Constitutional Amendment which, as hereinafter pointed out, is very pertinent as to the intent of our Congress.

Further Section 1311 of the Act of 1921 provides:

> "It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the U. S. to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer, or producer, visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures or any particular thereof set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstracts or particulars thereof to be seen or examined by any person except as provided by law: * * * and any offense against the foregoing provision shall be a misdemeanor and be punishable by a fine not exceeding

$1,000.00 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the U. S., he shall be dismissed from office or discharged from employment (R. S. 3167 Amd. Rev. Act, 1924, Sec. 1311, 42 Stat. 311-313)."

Now, there are good reasons why the details of a taxpayer's business, if legitimate, should not be revealed, by gatherers of income tax information, but say the information is that the taxpayer is in the "business" of committing crimes against the U. S., is it reasonably to be believed that Congress intended such information to be concealed?

If returns showed that an "expenditure" had been made to bribe an officer of the United States without which the unlawful business could not have been carried on, was it intended that the Revenue agent who revealed the bribery, should thereby commit a crime?

If it was intended that sources of criminal gain and expenditures should be reported such extraordinary consequences follow.

If the criminal gain is income it follows that the criminal taxpayer must be allowed "the ordinary and necessary expenses" of his "business" (Sec. 214).

If the Statute is broad enough to include the gains of criminal operations, it is broad enough to include their expenses and losses. *The principle of construction to be applied, whatever it is, must be consistent.*

Likewise, if the fruits of a successful crime are income, then it follows that the money losses of the unsuccessful sporadic crime, attempted for gain, such as occasional bootlegging, blackmailing, murdering, are losses incurred in a "transaction entered into for profit, though not in connection with the trade or business" and are deductible from the gains of legitimate businesses.

If Congress had such in mind would there not have

been included among the schedule of expenses not deductible, some specifications as to expenditures and losses incurred in the pursuit of crime.

It is obvious that Congress never intended any such thing, and it is most doubtful if the thought of taxing gain from crime ever occurred to them at the passage of the Act. Such an intent to be found must be read in.

Liquor traffic was flourishing at the time the Act was passed and had Congress intended the proceeds of crime to be considered as income, due to the novelty of such an intent, it would surely have used clear and unequivocal language.

Further, an immunity clause sufficient to meet the demands of the Fifth Amendment would have been a part of the Act so as to insure its effective administration and its constitutionality.

It cannot be said that Congress does not well know the necessity of such clauses and especially in the instant case where the question of self-incrimination would of necessity arise.

Since a Statute must be interpreted in such a way as to remove all doubts, if possible, as to the constitutionality of any part of it, the conclusion must be that every part of it should be enforceable, and when it was required that every recipient of income above the exempt minimum should make a detailed return, under oath, showing the sources of that income, *Congress had in mind such income as taxpayers could be compelled, under oath, to explain.*

It is submitted that the question is not whether Congress *can* tax gains from crime or not, but whether it was *intended* that such be done under the statute in question. In fact, the exact interest of many statutes is dubious, and it is the highest duty of the Court to put a proper and sound construction on such statutes. If such construction will avoid "singular results" it is respectfully urged that a logical common sense interpretation is the proper one.

The rule of construction that all reasonable doubts as to what constitutes income must be resolved in favor of the taxpayer and against the Government is well settled.

U. S. v. *Merriam*, 263 U. S. 178.
Gould v. *Gould*, 245 U. S. 151.

Summary of Point IV.

(I). Under the accepted definition of "income", criminal gains cannot be included.

(II). That unless it is clearly and unequivocally the legislative intent to tax gain from crime, such intent must not be read in by "judicial legislation".

(III). That in the instant case to read in such an intent leads not only to remarkable absurdities, but goes to the very constitutionality of the Act.

(IV). That all doubts as to what constitutes income must be resolved in favor of the taxpayer and against the Government.

CONCLUSION.

In final conclusion, it is respectfully submitted that in view of the present menace to all of the constitutional guarantees as evidenced by the effort of the executive branch of the Government to make "stealthy encroachments" upon this fundamental guarantee against self-incrimination, constituting as it does one of the great bulwarks of American liberty and the dangerous tendency of State and lower Federal Court to sustain such encroachments by creating unsound exceptions, it now becomes necessary for this Court to define in unmis-

takable terms, the limits beyond which there can be no legislative or executive encroachment upon such guarantee.

It is further respectfully submitted that a sound construction of the word "income" as used in the Revenue Act of 1921 excludes criminal gains.

WHEREFORE it is respectfully requested that the judgment of the Circuit Court of Appeals be affirmed.

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